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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ELEANOR SNYDER, EXECUTRIX OF THE ESTATE OF LEROY LILJEDAHL,

Petitioner,

v.

BRUTON SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress can provide for any appropriate jurisdictional limitation upon the right of parties who seek federal court enforcement of arbitration agreements;
2. Whether Congress has set forth a condition in the Federal Arbitration Act requiring that arbitration be held in the district where the petition for arbitration is statutorily authorized; and
3. Whether the efficient administration of the federal courts requires that time limitations be imposed particularly on appeals pertaining to arbitration orders.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption of the case in the Court contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW ..	i
LIST OF ALL PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
GROUNDS ON WHICH JURISDICTION IS INVOKED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
INTRODUCTION	6
I.	
THE CONFLICTING DECISIONS AMONG THE CIRCUITS REGARDING THE PROPER APPLICATION OF SECTION FOUR OF THE FEDERAL ARBITRATION ACT MANDATE THAT THE COURT CLARIFY THE LAW IN ORDER TO ENFORCE ARBITRATION PROVISIONS AS INTENDED BY THE ARBITRATION ACT AND AS ESPOUSED BY THE DECISIONS OF THE COURT	7
II.	
THE EFFICIENT ADMINISTRATION OF THE FEDERAL COURT SYSTEM REQUIRES THAT, PURSUANT TO THE DECISIONS AND POLICY OF THE COURT, TIME LIMITATIONS MUST BE IMPOSED PARTICULARLY ON APPEALS PERTAINING TO ARBITRATION ORDERS	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291 (2d Cir. 1965)	17
Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967 (9th Cir. 1941)	9, 10, 17
Couleur International, Ltd. v. Saint-Tropez West, 547 F. Supp. 176 (S.D.N.Y. 1982)	13
de Mouy v. Ingvoldstad, 664 F.2d 21 (3d Cir. 1981)	18
Dupuy-Busching General Agency, Inc. v. Ambassador Insurance Co., 524 F.2d 1275 (5th Cir. 1975)	11, 12, 13
E.C. Ernst, Inc. v. Potlatch Corporation, 462 F. Supp. 694 (S.D.N.Y. 1978)	13, 14
Econo-Car International, Inc. v. Antilles Car Rentals, Inc., 499 F.2d 1391 (3d Cir. 1974)	12
Farr & Co. v. CIA. Intercontinental De Navegacion, 243 F.2d 342 (2d Cir. 1957)	17
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	16, 18
Goodall-Sanford, Inc. v. United Textile Workers, 233 F.2d 104 (1st Cir. 1956), *aff'd* 353 U.S. 550 (1957)	17
Hartford Financial Systems, Inc. v. Florida Software Services, Inc., 712 F.2d 724 (1st Cir. 1983)	17
Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 62 F.2d 1004 (2d Cir. 1933)	17
Lewis v. Internal Revenue Service, 691 F.2d 858 (8th Cir. 1982)	18
Moses H. Cone Hospital v. Mercury Construction Corp., ... U.S. ....., 103 S. Ct. 927, 74 L.Ed. 2d 765 (1983)	14

Prima Paint Corporation v. Flood & Conklin, 388 U.S. 395 (1967) 15
Rogers v. Schering Corporation, 262 F.2d 180 (3d Cir.), *cert. denied*, 359 U.S. 991 (1959) 17
Snyder v. Smith, 736 F.2d 409 (7th Cir. 1984) . 8, 14, 17
University Life Insurance Company of America v. Unimarc, Ltd., 699 F.2d 846 (7th Cir. 1983) . 16, 17

Statutes

9 U.S.C. § 2 2
9 U.S.C. § 3 2
9 U.S.C. § 4 ..... 2, 7, 8
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 ..... 2, 16, 17
28 U.S.C. § 1332 4

Court Rules

Fed. R. App. P. 4(a)(1) 2, 16, 18

Periodicals

Burger, *Isn't There A Better Way?*, 68 A.B.A.J. 274 (1982) 6
Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153 (1925) 11

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 736 F.2d 409 (7th Cir. 1984) (App. 30). The opinion of the United States District Court for the Northern District of Illinois is unreported (App. 22).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 7, 1984. A timely petition for rehearing *en banc* was denied on July 3, 1984, and this petition is being filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 2, 3, and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 2-4; Section 1291 of Title 28, 28 U.S.C. § 1291; and Rule 4 of the Federal Rules of Appellate Procedure are set forth in the Appendix.

STATEMENT OF THE CASE

In September of 1971, Bruton Smith, Leroy Liljedahl, and Robert Hitt formed a general partnership known as Viking Investment Associates. Liljedahl died on December 9, 1976, and the Petitioner, Eleanor Snyder, is the executrix of his estate. The partnership agreement expressly provided that the death of a partner did not terminate the partnership and granted the surviving partners the right to purchase the entire interest of the

decedent or terminate and liquidate the partnership. In the event that the parties could not agree upon the purchase price, the partnership agreement provided that the price was to be determined by arbitration. The agreement specifically states:

> Any controversy or claim arising out of or relating to this agreement, or to the interpretation, breach or enforcement thereof, shall be submitted to three arbitrators and settled by arbitration in the City of Houston, Texas, in accordance with the rules then obtaining of the American Arbitration Association; provided, however, and notwithstanding any other provisions of such rules, if the matter submitted to arbitration shall involve a dispute as to the . . . value of a deceased . . . Partner's Entire Partnership Interest, such arbitration shall be held before three arbitrators, one of whom shall be a certified public accountant and the other two of whom shall be licensed real estate appraisers maintaining offices and doing business in Harris County, Texas . . . . Any award made by any majority of the Arbitrators shall be final, binding, and conclusive on all parties hereto for all purposes, and a judgment may be enforced thereon in any court having jurisdiction thereof. (App. 6).

By letter dated January 11, 1977, Smith notified Snyder that he intended to exercise his option to purchase the interest of Liljedahl. After sending that notice, however, Smith failed to comply with the various deadlines in the agreement for consummating the purchase and disputed the purchase price. Although Snyder's attorney advised Smith that the matter could be submitted to arbitration, Smith refused to do so.

After protracted negotiations, which lasted approximately forty-two (42) months, Smith remained unwilling to submit the parties' dispute to arbitration. Snyder filed a demand for arbitration with the American Arbitration

Association on July 14, 1980. On July 28, 1980, Smith notified the American Arbitration Association of his refusal to participate in the arbitration (App. 1). Also on July 28, 1980, Smith filed a lawsuit in a Texas state court in which he alleged that Snyder had breached the partnership agreement by refusing to convey the interest of Liljedahl to Smith (App. 54). On August 4, 1980, Snyder filed a petition to compel arbitration pursuant to Section Four of the Federal Arbitration Act in the Federal District Court for the Northern District of Illinois, Western Division. Jurisdiction was based upon diversity of citizenship. 28 U.S.C. § 1332. When the lawsuit was filed, Smith was a resident of North Carolina. Neither party has been a resident of Texas at any time during the pendency of the dispute.

The lawsuit filed by Smith was later removed by Snyder to a federal district court in Texas. On June 19, 1981, an agreed order was entered in the Texas proceeding by the district court directing that the cause of action be stayed pending final action by the Federal District Court for the Northern District of Illinois on Snyder's petition to compel arbitration (App. 3).

On September 1, 1981, the District Court for the Northern District of Illinois issued an order directing Smith to arbitrate the matters in dispute in Rockford, Illinois, and directing that the arbitration proceed in all respects in accordance with the provisions of the arbitration agreement (App. 15). Smith did not appeal the order of September 1, 1981.

The arbitration hearing was held in Rockford, Illinois, on September 28 and 29, 1982, before three arbitrators. As required by the partnership agreement, one was a certified public accountant and the other two were licensed real estate appraisers maintaining offices and doing busi-

ness in Harris County, Texas. The arbitration panel reached a decision on October 15, 1982 (App. 20). The trial court confirmed the award on May 4, 1983, and on May 20, 1983, entered a judgment against Smith in the amount of Five Hundred Seventy-Six Thousand Forty-One Dollars and Fifty-Nine Cents ($576,041.59), plus costs (App. 28). Smith filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit on June 17, 1983.

On January 18, 1984, the case was argued before Judge Bauer, Judge Flaum, and Judge Swygert of the Seventh Circuit. In its opinion, the divided court held as follows: (1) that the district court had personal and subject matter jurisdiction; (2) that the Federal Arbitration Act was applicable to the partnership agreement; (3) that the prior decision in *University Life Insurance Company of America v. Unimarc, Ltd.*, 699 F.2d 846 (7th Cir. 1983), did not mandate dismissal of Smith's appeal on jurisdictional grounds; and (4) that the district court lacked the power to compel arbitration in the Northern District of Illinois because the arbitration provision of the partnership agreement provided that arbitration was to take place in Houston, Texas. *Snyder v. Smith*, 736 F.2d 409, 416, 418, 419, 420 (7th Cir. 1984).

Judge Bauer dissented on the basis of "the need to give full effect both to the jurisdiction conferred under Section Four and to the policy favoring arbitration that underlies the Federal Arbitration Act." *Id.* at 421. Snyder timely filed a petition for rehearing *en banc*, which the court denied on July 3, 1984.

REASONS FOR GRANTING THE WRIT

Introduction

The ever increasing utilization of arbitration as an alternative means of settling disputes mandates the resolution of the statutory construction question presented by this petition. The Court's consideration and decision regarding the proper construction of the Federal Arbitration Act will provide clarification for the federal judiciary, will enhance the efficient administration of justice, and will promote the use of arbitration by both the business community and the legal profession.

The benefits of arbitration as an alternative to litigation and as a complement to the judicial system result primarily from the speed and the relative economy with which resolution of disputes can be achieved. *See* Burger, *Isn't There A Better Way?*, 68 A.B.A.J. 274 (1982) (annual report on the state of the judiciary given by Chief Justice Burger at a meeting of the American Bar Association). However, the uncertainty created by the Seventh Circuit's construction of Section Four of the Federal Arbitration Act undermines the fundamental objectives of arbitration. Moreover, the Court should grant this petition in order to eliminate the confusion that exists among the federal circuits and within the Seventh Circuit regarding the construction of the statute.

I.

THE CONFLICTING DECISIONS AMONG THE CIRCUITS REGARDING THE PROPER APPLICATION OF SECTION FOUR OF THE FEDERAL ARBITRATION ACT MANDATE THAT THE COURT CLARIFY THE LAW IN ORDER TO ENFORCE ARBITRATION PROVISIONS AS INTENDED BY THE ARBITRATION ACT AND AS ESPOUSED BY THE DECISIONS OF THE COURT.

The primary vehicle for enforcement of arbitration provisions in contracts involving interstate commerce is Section Four of the Federal Arbitration Act, which provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition *any United States district court which, save for such agreement, would have jurisdiction under Title 28,* in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.* . . .

9 U.S.C. § 4 (emphasis supplied).

Petitioner requests the Court to address the application of the statute to contracts that designate a particular situs for the arbitration proceedings. The Seventh Circuit held that the designation of Houston, Texas, as the situs for arbitration proceedings under the partnership agreement

prohibited the District Court for the Northern District of Illinois from exercising its authority to compel arbitration under Section Four. The propriety of the Seventh Circuit's reading of the statute should be considered by the Court.

A careful review of the decisions of other courts demonstrates substantial confusion regarding the construction of Section Four with respect to the appropriate location for arbitration proceedings. The following cases illustrate the inconsistent rulings by various courts in determining the situs of arbitration proceedings.

In this case, the majority of the Seventh Circuit panel agreed that the District Court for the Northern District of Illinois had both personal and subject matter jurisdiction and that venue was otherwise proper. *Snyder v. Smith*, 736 F.2d 409, 416-17 (1984). However, as to the situs of the arbitration proceeding herein, Judge Swygert and Judge Flaum held that the statutory requirement that the court order arbitration according to the terms of the agreement limited the power of the district court, despite the language of the statute requiring that the hearing under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. The divided court concluded that the situs designation in the agreement overrode the district court's statutory authority to compel arbitration.

In dissent, Judge Bauer stressed that the broad power to compel arbitration extends to "*any* United States district court which . . . would have jurisdiction under Title 28." 9 U.S.C. § 4. Judge Bauer further emphasized the "need to give full effect both to the jurisdiction conferred under Section Four and to the policy favoring arbitration that underlies the Federal Arbitration Act." 736 F.2d at 421.

In addition to the confusion regarding the construction of the statute that exists within the Seventh Circuit, the Ninth Circuit has adopted a construction of Section Four that directly conflicts with the majority opinion in the Seventh Circuit. *Continental Grain Co. v. Dant & Russell, Inc.*, 118 F.2d 967 (9th Cir. 1941). The agreement in *Continental Grain* provided for arbitration of disputes in New York. One party resided in New York and the other in Oregon. A dispute developed involving money that Dant & Russell allegedly owed to Continental. Continental demanded arbitration, but Dant & Russell, like Smith in the instant case, refused. Continental then filed a motion in the United States District Court in Oregon to compel arbitration, although the agreement provided for arbitration in New York. *Id.* at 968. The court granted the motion to compel arbitration but, pursuant to Section Four of the Arbitration Act, provided in its order that the hearing and proceedings under the agreement would take place in Oregon. Continental appealed, arguing that the arbitration should have taken place in New York, as that was the forum agreed to by the parties. *Id.* The Ninth Circuit rejected that argument, and its reasons for doing so illustrate the conflict with the reasoning adopted by the Seventh Circuit.

The Ninth Circuit noted that the exact, original wording of the statute differed in one significant aspect from that which appeared in the official compilation for the United States Code. The statute had originally provided in pertinent part:

> [T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided, That* the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.

Id. at 969 (emphasis supplied). The Ninth Circuit viewed the quoted proviso as a limitation on the right of the parties to arbitration at a specific location in accordance with the terms of the contract. Accordingly, the court concluded:

> If there could be any doubt of the power of the legislature to limit the right of arbitration to one conducted within the jurisdiction of the district court ordering the arbitration, it must be dispelled by the consideration that Congress could attach any limitation it desired to the right to enforce arbitration in the federal courts, that it has made a condition that the arbitration be held in the district where the court sits, [and] that the contract in question was executed with a knowledge that Congress had so provided, . . .

Id. In *Continental Grain*, the Ninth Circuit held that the express statutory provision requiring arbitration within the district of the court entering the order to compel arbitration took precedence over the forum selection clause in the arbitration agreement. The holding of the Ninth Circuit thus concurs with the dissenting opinion of Judge Bauer in the instant case. Judge Bauer aptly emphasized that the opinion of the majority, which permitted the terms of the agreement to override the jurisdiction of the district court, totally negated the broad jurisdictional power that Congress conferred upon the federal courts under Section Four of the Arbitration Act. The majority's restrictive reading of the statute thus frustrated the purpose of the statute. When Smith had failed to comply with the terms of the agreement for forty-two months, Snyder filed a demand for arbitration with the American Arbitration Association. When Smith refused to arbitrate, Snyder sought relief by filing a petition in the District Court for the Northern District of Illi-

nois to compel arbitration. The Seventh Circuit erroneously impeded the arbitration by depriving the district court of its authority to compel arbitration under the terms of the Act. *See also* Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153, 154 (1925) (summary of arbitration act by its principal draftsmen, which likewise indicates that the requirement that proceedings be within the district supersedes the right to arbitration according to the terms of the agreement). Thus, had the instant case been brought in the Ninth Circuit, the authority of the district court to compel arbitration in its own district would have been upheld.

To further demonstrate the substantial confusion among the circuits regarding the construction of Section Four, the following case illustrates that a similarly situated litigant in the Fifth Circuit could obtain a result different from that in either the Seventh or the Ninth Circuit. In *Dupuy-Busching General Agency, Inc. v. Ambassador Insurance Co.*, 524 F.2d 1275 (5th Cir. 1975), the Fifth Circuit affirmed an order by the District Court for the Southern District of Mississippi compelling arbitration in New Jersey. The contract in question involved insurance commissions and included a provision for resolution of disputes by arbitration in North Bergen, New Jersey. *Id.* at 1276. A dispute arose, and Ambassador filed a demand for arbitration. *Id.* Dupuy-Busching then filed suit in a Mississippi state court to enjoin the arbitration and revoke its agreement to arbitrate. Ambassador removed the case to the United States District Court for the Southern District of Mississippi and counterclaimed pursuant to Section Four of the Federal Arbitration Act to compel arbitration. *Id.* The district court ruled in favor of Ambassador on the counterclaim and ordered arbitration to

proceed in New Jersey as provided in the agreement. *Id.* at 1277.

The Fifth Circuit justified its disregard for the statutory requirement that the proceedings shall be held within the district on procedural grounds. The Section Four motion to compel arbitration was, according to the court, a compulsory counterclaim that would have been barred if not raised in the federal district court in Mississippi. *Id.* The court limited its holding to Section Four motions filed in response to a suit brought to avoid arbitration in a district other than that specified in the agreement. *Id.* Thus, a litigant in the Fifth Circuit may, under certain circumstances, obtain an order compelling arbitration outside the district in which the Section Four motion is filed, although the statute appears to preclude that result.

The Third Circuit, however, reversed a similar order entered by the district court for the Virgin Islands compelling arbitration in New York in *Econo-Car International, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3d Cir. 1974). While the petition to compel in *Econo-Car* was the initial pleading in the district court rather than a responsive pleading as in *Dupuy-Busching*, the pertinent language in the opinion is unequivocal. Noting the dilemma created by the statutory language and the forum selection clause in the contract, the court concluded:

> [W]e are inclined to heed the unambiguous statutory language limiting the district court's power to order arbitration outside of the district. We hold, therefore, that the district court erred in ordering arbitration to take place in New York City.

Id. at 1394. The Third Circuit further concluded, "[T]he Federal Arbitration Act extends to the district court for the Virgin Islands, thereby conferring upon it the power to direct arbitration in the present case." *Id.*

In the Second Circuit, a district court may not compel arbitration outside its own district, regardless of the procedural posture of the Section Four petition. *Couleur International, Ltd. v. Saint-Tropez West*, 547 F. Supp. 176 (S.D.N.Y. 1982), illustrates this point. The parties in *Couleur* resided in New York and California. The dispute arose in the context of a "battle of the forms." One provided for arbitration in New York, the other in California. *Id.* at 177. Like *Dupuy-Busching General Agency, Inc. v. Ambassador Insurance Co.*, 524 F.2d 1275 (5th Cir. 1975), the Section Four petition before the court was a responsive pleading. 547 F. Supp. at 177. The court nevertheless denied the motion, reasoning that it had no power under the statute to compel arbitration outside its own district. *Id.* at 177-78.

A prior decision by that court reached the same result and, in dicta, implicitly adopted the reasoning of the Ninth Circuit with respect to the issue in the instant case. *E.C. Ernst, Inc., v. Potlatch Corporation*, 462 F. Supp. 694 (S.D.N.Y. 1978), involved a dispute with respect to the performance of a contract to build a paper mill in Arkansas. *Id.* at 696. The arbitration provision in the contract did not specify any particular situs for the proceedings. *Id.* at 694 n.5. Suit was filed by a subcontractor in an Arkansas state court naming Potlatch as a defendant. Potlatch then filed a third party action against Ernst. Ernst demurred and filed a Section Four petition to compel arbitration in New York. *Id.* at 696. Potlatch argued that the matter should be transferred to Arkansas. The court agreed that the equities favored such a transfer, but nonetheless concluded that it was without power to do so. *Id.* at 697. Citing *Econo-Car*, the court concluded:

> [A]rbitration must take place within the district of the court compelling arbitration regardless of the designation of locale in the contract.

Id. Later in the opinion the court observed:

> As the law read in 1925, it was possible for a contract to provide for arbitration in Kansas, for example, and for a New York corporation to sue to compel arbitration in New York against a California corporation.

Id. at 699.

As none of the critical provisions of Section Four has been amended since 1925, the Southern District of New York apparently adheres to the reasoning of the Ninth Circuit and would have reached the same result as the District Court for the Northern District of Illinois on the facts of this case. Moreover, the Southern District of New York, as well as the Ninth Circuit, would apparently concur with the dissenting opinion of Judge Bauer herein. Judge Bauer noted that the opinion of the majority expressed concern over the potential for forum shopping if the district court's order were upheld. Judge Bauer pointed out that jurisdiction under Section Four of the Federal Arbitration Act is specifically limited by the traditional jurisdiction and venue requirements of Title 28. *Snyder v. Smith*, 736 F.2d 409, 421 (7th Cir. 1984). Given the decisions in the District Courts of New York that impliedly agree with the reasoning of the dissent by Judge Bauer herein, an apparent conflict thus also exists between the Seventh and Second Circuits with respect to the statutory construction issue raised by this petition.

The restrictive construction of Section Four adopted by the divided court herein conflicts with the public policy objectives of speedy and economical dispute resolution embodied in the Federal Arbitration Act, as repeatedly articulated by the Court. *See, e.g., Moses H. Cone Hospital v. Mercury Construction Corp.*, ... U.S. ....., 103 S.Ct. 927, 74 L.Ed. 2d 765, 784 (1983) (noting statutory policy

to promote rapid and unobstructed enforcement of arbitration agreements); *Prima Paint Corporation v. Flood & Conklin*, 388 U.S. 395, 404 (1967) (unmistakably clear Congressional purpose that the arbitration procedure, when selected by the parties, be speedy and not subject to delay and obstruction in the courts).

More important, when compared to decisions of other circuits, the Seventh Circuit majority opinion demonstrates the substantial confusion that exists in the interpretation of the statute. If arbitration is to be a speedy and efficient alternative means of dispute resolution, each party to an arbitration agreement must know with certainty where and how it can enforce that agreement in the event the other party refuses to arbitrate. While the language of the statute seems clear, the limitation of the authority of district courts imposed by the Seventh Circuit injects ambiguity where there appeared to be none. Petitioner submits that the Court should resolve the conflict among the circuits with respect to the meaning of Section Four of the Federal Arbitration Act so that the modern trend toward extra-judicial dispute resolution can continue to develop in an orderly fashion.

II.

THE EFFICIENT ADMINISTRATION OF THE FEDERAL COURT SYSTEM REQUIRES THAT, PURSUANT TO THE DECISIONS AND POLICY OF THE COURT, TIME LIMITATIONS MUST BE IMPOSED PARTICULARLY ON APPEALS PERTAINING TO ARBITRATION ORDERS.

Timely disposition of a dispute is the most essential goal of arbitration. The parties to an arbitration procedure have bartered away their traditional procedural rights within the judicial system in order to effect a rapid and efficient resolution of the dispute. Unlimited time, therefore, is the very antithesis of arbitration. As the overseer of the efficient administration of arbitration within the federal judicial system, the Court should address and correct those procedures that frustrate the timeliness of arbitration.

In the instant case, the Seventh Circuit lacked subject matter jurisdiction over Smith's untimely appeal and, therefore, should have dismissed the appeal without reaching the merits. In *University Life Insurance Company of America v. Unimarc, Ltd.*, 699 F.2d 846 (7th Cir. 1983), the Seventh Circuit held that an order compelling arbitration is a final appealable order for purposes of appellate jurisdiction under 28 U.S.C. § 1291. *Id.* at 848. The failure to apply this rule to the instant appeal directly contravenes the rule articulated by the Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981), that jurisdictional decisions may never be applied prospectively only.

Smith did not appeal the order compelling arbitration within the time limits established by Fed. R. App. P. 4(a). He chose instead to await the outcome of the arbitration proceedings and appealed the judgment confirming the

award. The decision of the Seventh Circuit gives Smith two opportunities to arbitrate since Snyder must now repeat the entire process in Houston. Moreover, the decision of the Seventh Circuit frustrates the purpose of arbitration by unduly increasing the expense of the arbitration itself and by depriving petitioner of access to the arbitrators' award of nearly $600,000. The Seventh Circuit has has thus permitted litigation to exacerbate and prolong the very procedure intended to alleviate the problems attendant to traditional court proceedings.

Although the Seventh Circuit had not squarely addressed the issue of whether an order compelling arbitration was appealable at the time the district court entered its order, 736 F.2d at 414, the weight of the authority held that such an order was a final appealable order under 28 U.S.C. § 1291. *See, e.g., Continental Grain Co. v. Dant & Russell, Inc.*, 118 F.2d 967, 968 (9th Cir. 1941); *Goodall-Sanford, Inc. v. United Textile Workers*, 233 F.2d 104, 106 (1st Cir. 1956), *aff'd*, 353 U.S. 550 (1957); *Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc.*, 62 F.2d 1004, 1005 (2d Cir. 1933) (L. Hand, J.); *Farr & Co. v. CIA. Intercontinental De Navegacion*, 243 F.2d 342, 345 (2d Cir. 1957); *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F.2d 291, 294 (2d Cir. 1965) (Friendly, J.); *Rogers v. Schering Corporation*, 262 F.2d 180, 182 (3d Cir.), *cert. denied*, 359 U.S. 991 (1959) (issue considered settled). *See also Hartford Financial Systems, Inc. v. Florida Software Services, Inc.*, 712 F.2d 724, 728 (1st Cir. 1983) (when Section Four motions are made it is universally conceded that the resulting order is final and appealable).

At the time this appeal was taken, *University Life* had been decided in accordance with the weight of the authority in other jurisdictions. On the basis of *University Life* and the mandate of *Firestone*, the Seventh Circuit lacked

jurisdiction to review the order compelling arbitration because Smith had failed to appeal it within the time limit established by Fed. R. App. P. 4(a). The majority's concern for possible prejudice to Smith is misplaced for two reasons. First, the case law put him on notice that there was a reasonable basis to conclude that the order to arbitrate was a final appealable order. Second, and more important, the Seventh Circuit lacked discretion to apply the jurisdictional rule of *University Life* prospectively only. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). *Accord Lewis v. Internal Revenue Service*, 691 F.2d 858 (8th Cir. 1982); *de Mouy v. Ingvoldstad*, 664 F.2d 21 (3d Cir. 1981). Petitioner respectfully requests that the Court resolve the conflict between the decision of the Seventh Circuit in this case and the prior decision of the Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

Snyder is the party prejudiced by the opinion of the divided court herein, because now, four years later, Snyder will be forced to endure the additional delay and incur the additional expense of filing another petition to compel arbitration in the Southern District of Texas. The Texas court's order compelling arbitration and the ultimate arbitration hearing will be identical in all respects to the September, 1982, proceedings, excepting only the location. This is indeed an ironic result of the construction of a statute specifically designed to provide a convenient, speedy, and economical alternative to litigation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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INDEX TO APPENDIX

		Page
DEMAND FOR ARBITRATION (July 14, 1980) .		1
PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.		
A.	Petition to Compel Arbitration (August 4, 1980)	3
B.	Excerpt from Viking Investment Associates' Partnership Agreement	6
C.	Magistrate P. Michael Mahoney's Report and Recommendation (Docketed 1/29/81)	7
D.	Judge Stanley J. Roszkowski's Order adopting Report and Recommendation (Docketed 3/3/81)	15
E.	Judge Stanley J. Roszkowski's Order compelling arbitration in Rockford, Illinois (Docketed 9/1/81)	15
F.	Award of Arbitrators (Dated 10/82)	20
G.	Judge Stanley J. Roszkowski's Order confirming arbitration award (Docketed 5/4/83) ...	21
H.	Judge Stanely J. Roszkowski's Order—Judgment in favor of Plaintiff (Docketed 5/20/83) .	28
I.	Notice of Appeal (of Bruton Smith) (Filed 6/17/83)	29

PROCEEDINGS BEFORE THE SEVENTH CIRCUIT COURT OF APPEALS.

A. Order and Accompanying Opinion Reversing the Decision of the District Court for the Northern District of Illinois (Docketed 6/7/84) [736 F.2d 409 (7th Cir. 1984)] 30

B. Order Denying Petition for Rehearing En Banc (Docketed 7/3/84) 50

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (Cause No. H-80-2018) (Docketed 6/19/81) . 51

LETTER DATED 7/28/80 FROM JOHN L. CARTER ON BEHALF OF BRUTON SMITH TO THE AMERICAN ARBITRATION ASSOCIATION (Refusal to Arbitrate) 52

COMPLAINT FILED BY BRUTON SMITH IN THE STATE COURT FOR THE DISTRICT OF HARRIS COUNTY, TEXAS (Filed 7/28/80) ... 54

STATUTES AND RULES INVOLVED 59

In The

Supreme Court of the United States

October Term, 1984

ELEANOR SNYDER, EXECUTRIX OF THE ESTATE OF LEROY LILJEDAHL,

Petitioner,

v.

BRUTON SMITH,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

App. 1

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

Date: July 14, 1980

(Name) MR. BRUTON SMITH
(Address) 5401 East Independence Blvd.
(City and State) Charlotte, NC (Zip Code) 28218
(Telephone) 704 536-5600

Named claimant, a party to an arbitration agreement contained in a written contract, dated September, 1971, providing for arbitration, hereby demands arbitration thereunder.
(attach arbitration clause)

Artice VII of the Viking Associates Partnership Agreement is attached

NATURE OF DISPUTE: Leroy Liljedahl, a partner in Viking Investment Association died on December 9, 1976. On January 31, 1977 Bruton Smith, a surviving partner, notified the decedent's executor of his election, under Article V of the Partnership Agreement, to purchase the decedent's entire interest in the Partnership. Bruton Smith then breached the Partnership Agreement by failing to comply with the provisions in Article V with respect to the procedures and time limits for determining the fair market value of the real estate owned by the partnership and by failing to comply with the provisions in Article V with respect to the determination of the book value of the decedent's entire partnership interest. Bruton Smith also failed to dispute the adjusted book value of the decedent's interest in accordance with the procedures of Article V.

CLAIM OR RELIEF SOUGHT: (amount, if any)

A determination of the adjusted book value of Mr. Leroy Liljedahl's "Entire Partnership Interest" in accordance with the Viking Associates Partnership Agreement and an Award directing Mr. Smith to purchase the decedent's entire partnership interest in accordance with the partnership agreement.

HEARING LOCALE REQUESTED: Rockford, Illinois

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its Chicago, Illinois Regional Office, with the request that it commence the administration of the arbitration. Under Section 7 of the Commercial Arbitration Rules, you may file an answering statement within seven days after notice from the Administrator.

Signed John D. Whitcher Title Attorney for Executrix of the Estate of Leroy Liljedahl, deceased

Name of Claimant	Mrs. Eleanor Snyder
Address (to be used in connection with this case)	1909 Boscobel Court
City and State	Rockford, IL
Zip Code	61107
Telephone	815 399-1783
Name of Attorney	John D. Whitcher
Address	800 North Church
City and State	Rockford, IL
Zip Code	61103
Telephone	815 962-7071

To institute proceedings, please send three copies of this Demand with the administrative fee, as provided in Section 47 of the Rules, to the AAA. Send original Demand to Respondent.

App. 3

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In the matter of the Arbitration between

ELEANOR SNYDER, Executrix of the Estate of Leroy Liljedahl,

Petitioner,

Civil Action
No. [80 C 0103] v.

BRUTON SMITH,

Respondent.

PETITION TO COMPEL ARBITRATION

To The Honorable Judge Of The United States District Court For The Northern District Of Illinois, Western Division:

NOW COMES ELEANOR SNYDER, Executor of the Estate of Leroy E. Liljedahl, Petitioner by her attorneys, Welsh, Holmstrom, Gaines & Lindstedt, Ltd., and for her Petition to Compel Arbitration states as follows:

1. This Petition to compel Arbitration is made pursuant to Section 4 of the United States Arbitration Act 9 U.S.C. 1 et seq.

2. The jurisdiction of this Court is based upon the United States Arbitration Act 9 U.S.C. 1 et seq. and the diverse citizenship of the parties, 28 U.S.C. 1332, to wit: The Petitioner is a citizen of the State of Illinois and the Respondent is a citizen of North Carolina. The matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

3. In September 1971, Petitioner and Respondent entered into an agreement in writing. The agreement is

a partnership agreement for Viking Investment Associates. A copy of the partnership agreement is attached and incorporated as Exhibit A.

4. The agreement contains the following clause relating to Arbitration:

ARTICLE VII

Arbitration

> Any controversy or claim arising out of or relating to this agreement, or to the interpretation, breach or enforcement thereof, shall be submitted to three arbitrators and settled by arbitration in the City of Houston, Texas, in accordance with the rules then obtaining of the American Arbitration Association; provided, however, and notwithstanding any other provisions of such rules, if the matter submitted to arbitration shall involve a dispute as to the adjusted book value of a deceased, disabled, incompetent, or retiring Partner's Entire Partnership Interest, such arbitration shall be held before three arbitrators, one of whom shall be a certified public accountant and the other two of whom shall be licensed real estate appraisers maintaining offices and doing business in Harris County, Texas. The arbitrators shall be selected by the American Arbitration Association. Any award made by any majority of the Arbitrators shall be final, binding, and conclusive on all parties hereto for all purposes, and a judgment may be enforced thereon in any court having jurisdiction thereof.

5. Leroy E. Liljedahl, a partner in Viking Investment Associates died on December 9, 1976. On January 31, 1977 Bruton Smith, a surviving partner, notified the decedent's executor of his election, under Article V of the Partnership Agreement, to purchase the decedent's entire interest in the Partnership. Bruton Smith then breached the Partnership Agreement by failing to comply with the provisions in Article V with respect to the procedures and time limits for determining the fair market value of the real

estate owned by the partnership and by failing to comply with the provisions in Article V with respect to the determination of the book value of the decedent's entire partnership interest. Bruton Smith also failed to dispute the adjusted book value of the decedent's interest in accordance with the procedures of Article V.

6. A controversy having arisen between the Petitioner and the Respondent in respect to the agreement herein referenced the Petitioner on or about the 15th day of July, 1980 served a demand for Arbitration by certified mail on the Respondent in accordance with Section 7 of the Commercial Arbitration Rules of the American Arbitration Association. A copy of said Notice is attached and incorporated herein as Exhibit B.

7. By means of a July 28, 1980 letter from Mr. Smith's attorneys to the Chicago Regional Office of the American Arbitration Association, the Respondent has formally notified the Petitioner of his refusal to comply with his agreement to arbitrate the dispute made subject of the demand for arbitration. A copy of said letter is attached and incorporated herein as Exhibit C.

8. The making of the agreement, including the agreement to submit the dispute in controversy to Arbitration is not in issue.

WHEREFORE, Petitioner respectfully moves the Court for an order that Arbitration between the parties proceed and for such other and further relief as the court may deem just and proper together with costs of this application.

Respectfully submitted,
/s/ John D. Whitcher

WELSH, HOLMSTROM, GAINES & LINDSTEDT, LTD.
800 North Church St.
P.O. Box 589
Rockford, IL 61105
815/962-7071

ARTICLE VII

Arbitration

Any controversy or claim arising out of or relating to this agreement, or to the interpretation, breach or enforcement thereof, shall be submitted to three arbitrators and settled by arbitration in the City of Houston, Texas, in accordance with the rules then obtaining of the American Arbitration Association; provided, however, and notwithstanding any other provisions of such rules, if the matter submitted to arbitration shall involve a dispute as to the adjusted book value of a deceased, disabled, incompetent, or retiring Partner's Entire Partnership Interest, such arbitration shall be held before three arbitrators, one of whom shall be a certified public accountant and the other two of whom shall be licensed real estate appraisers maintaining offices and doing business in Harris County, Texas. The arbitrators shall be selected by the American Arbitration Association. Any award made by any majority of the Arbitrators shall be final, binding, and conclusive on all parties hereto for all purposes, and a judgment may be enforced thereon in any court having jurisdiction thereof.

App. 7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Name of Presiding Judge:
Honorable P. Michael Mahoney, Magistrate

Cause No. 80 C 0103 Date Jan. 29, 1981

Title of Cause: Eleanor Snyder v.
Bruton Smith

REPORT & RECOMMENDATION

It is the report and recommendation of the Magistrate that the defendant's motion to dismiss be denied. DRAFT. Each party is given ten (10) days within receipt of this recommendation to file any written objections with the office of the Clerk, Room 252, Federal Bldg., Rockford, Illinois addressed to Judge Stanley J. Roszkowski.

Mahoney, M.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

ELEANOR SNYDER, Executrix of the Estate of Leroy Liljedahl,

Plaintiff,

Civil Action
No. 80 C 0103 v.

BRUTON SMITH,

Defendant.

REPORT AND RECOMMENDATION

Plaintiff filed this petition to compel arbitration on August 4, 1980. Jurisdiction of this court is based upon the United States Arbitration Act, 9 USC § 1, et seq. and diversity of citizenship in that the petitioner is a citizen of the State of Illinois and the defendant is a citizen of North Carolina and the matter in controversy exceeds the sum of $10,000.

The plaintiff alleges that in September, 1971 the decedent and defendant entered into a partnership agreement for Viking Investment Associates. The agreement contained an arbitration clause. Plaintiff alleges that on December 9, 1976 Leroy Liljedahl, a partner in Viking Investment Associates, died.

On January 31, 1977, defendant, Bruton Smith, a surviving partner notified the decedent's executrix of his election to purchase the decedent's entire interest in the partnership. Plaintiff alleges that the defendant then breached the partnership agreement by failing to comply with the provisions for arbitration in Article V of the agreement for determining the fair market value of the real estate owned by the partnership.

Plaintiff asks this court to enter an order that arbitration between the parties proceed and for other relief as may be just and proper. On September 3, 1980 the defendant filed a motion to dismiss for lack of jurisdiction over the person and insufficient service of process. This motion was fully briefed on October 27, 1980 and is before the Magistrate for report and recommendation.

In his motion to dismiss, filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the defendant states by way of affidavit that he was served with process by personal service upon him in Charlotte, North Carolina by a United States Marshal. It is defendant's contention that inasmuch as Charlotte, North Carolina is outside the territorial limits of the State of Illinois personal service is improper under Rule 4 of the Federal Rules of Civil Procedure and, therefore, this cause should be dismissed for improper service of process.

Secondly, the defendant states that he is not subject to the jurisdiction of this court because he is not a citizen of the State of Illinois, was not served with process within this state and does not maintain any contact with the State of Illinois. Further, the defendant contends that the contract upon which plaintiff bases her claim was made in the State of Texas, to be performed in the State of Texas and that the State of Illinois has no contact with the parties other than that being the residence of the plaintiff.

Opinion

There are two parts to defendant's motion to dismiss: (1) insufficient service of process; and (2) lack of in personam jurisdiction. Defendant argues that the personal service of process was improper because there is no Federal statute which would permit service of process on him outside the State of Illinois. Rule 4(d)(7) of the Federal Rules of Civil Procedure provides for service of process "in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state

in which a district court is held for the service of summons or other like process upon any such defendant in an action brought in the court's general jurisdiction of that state." If the defendant was properly served under the Illinois Revised Statute then this service would be valid in Federal Court. Ill. Rev. Stat. ch. 110 § 17(2) provides:

> "Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State."

Ill. Rev. Stat. ch. 110 § 16(1) provides that:

> "Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; . . ."

The above cited statutes clearly provide for personal service of process on an out of state defendant if he has submitted to the jurisdiction of the courts of this state. The only question, therefore, that remains is whether the defendant, Bruton Smith, has submitted to the jurisdiction of the courts of the State of Illinois, therefore, making personal service proper.

It is the plaintiff's contention that the defendant, Bruton Smith, is subject to the personal jurisdiction of this court pursuant to the long-arm statute of the State of Illinois. Ill. Rev. Stat. ch. 110 § 17 provides:

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State;

(c) The ownership, use, or possession of any real estate situated in this State;

(d) Contracting to insure any person, property or risk located within this State at the time of contracting;

(e) With respect to actions of dissolution of marriage and legal separation, the maintenance in this State of a matrimonial domicile.

(2) Service or process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

Plaintiff contends that the defendant had transacted business within the State of Illinois and has committed a tortious act within the State of Illinois out of which this cause of action arose.

Personal jurisdiction over a non-resident defendant does not depend solely upon the physical presence of the defendant within the state. It is sufficient that the act or transaction itself has a substantial connection with the forum state.

The legislative intent of the Illinois long-arm statute is to exert jurisdiction over non-residents to the extent permitted under the due process clause of the United States Constitution. *Nelson v. Miller*, 11 Ill.2d. 378; 143 N.E.2d. 673 (1957). Sufficient minimum contacts must exist in the forum state so that jurisdiction over a non-resident defendant is reasonable and just according to the traditional concepts of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The relevant question is whether the defendant has engaged in some act or conduct by which he may be said to have invoked the benefits and protection of the law of the forum state. *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d. 432, 440; 176 N.E.2d. 761, 765 (1961). Illinois courts have exercised jurisdiction over non-resident defendants even though the contact with the state involved only a single business transaction. *Ziegler v. Hodges*, 224 N.E.2d. 12 (2nd Dist. 1967).

The plaintiff has asserted two bases for jurisdiction over Mr. Smith under the Illinois long-arm statute. The first being the transaction of business within the state, and secondly the commission of a tortious act within the state. In support of the first proposition the plaintiff has supplied the court with brief affidavits and exhibits.

The first is the affidavit of David W. Knapp, President of the American National Bank & Trust Company in Rockford, Illinois. Mr. Knapp in his affidavit states that Viking Investments Associates was a partnership which was formed in 1971 and at the time the partnership was formed all of the members of the partnership were Illinois residents. Further, that the partnership agreement was prepared by a Rockford attorney. The affidavit goes on to point out that the mailing address of the partnership was a Rockford address and that the American National Bank & Trust Company of Rockford made several loans to the partnership and that the partnership had a checking account in Rockford, Illinois. Further, according to the affidavit of Mr. Knapp, at the time that Mr. Smith

exercised the option to purchase the decedent's share of the partnership Smith was a resident of the State of Illinois and was conducting business for the partnership from his office in Rockford, Illinois. Knapp states that on October 26, 1979 he himself discussed settlement of this dispute with Bruton Smith, in Smith's office in Rockford, and at that time Mr. Knapp was acting as an intermediary between the plaintiff and the defendant.

The affidavit of John Holmstrom is also offered. Mr. Holmstrom is an attorney in Rockford, Illinois and he is the attorney representing the plaintiff in this cause. According to Mr. Holmstrom the mailing address of the partnership called "Viking Investment Associates" is in Rockford, Illinois and as attorney for the executrix he has mailed several letters to that address in Rockford. He further states that he has had numerous telephone conferences with Bruton Smith in Rockford concerning the dispute which is the subject of this lawsuit. Most importantly to the Magistrate, Mr. Holmstrom had received one letter from Bruton Smith, the defendant, dated January 31, 1977, signed by Mr. Smith, with the Rockford return address on the letter. This letter expressed Smith's desire to purchase the partnership interest of the decedent. (Exhibit 2C).

There is also the affidavit of the executrix which restates many of the previously mentioned facts. In addition, attached to that document is "Exhibit 3A" which is a letter from Bruton Smith to Mrs. Liljedahl, again with a return address in Rockford, that says the following:

> "Per Article V of the Viking Investment Associates Partnership Agreement, it is the desire of the partnership to purchase the interest of Leroy E. Liljedahl."

After reviewing this document it seems entirely incredible to the Magistrate that anyone would seriously contend that the defendant, Bruton Smith, was not transacting business within the State of Illinois within the meaning of Section 17. In regard to this transaction and

the controversy which is the subject of this lawsuit the defendant's sole defense seems to be that he is now a resident of North Carolina, that the partnership agreement was executed in the State of Texas, that it was to be performed in the State of Texas and, therefore, it should be up to the Texas courts to determine what law should be applied and that is where the arbitration agreement should be interpreted.

It is the opinion of the Magistrate that none of the defendant's contentions are determinative of whether or not the defendant transacted business or committed a tort within the State of Illinois. Further, the Magistrate declines to comment as to the applicability of Texas law with regards to the interpretation of the other provisions of the contract. The only question before the court is the in personam jurisdiction over the defendant and it is the opinion of the Magistrate that the numerous jurisdictional facts related in plaintiff's affidavits are sufficient to assert jurisdiction over this defendant without offending traditional notions of fair play and substantial justice.

It is, therefore, the opinion of the Magistrate that the defendant, Bruton Smith, has transacted business within Illinois sufficiently for this court to maintain in personam jurisdiction over him and that, therefore, the defendant's motion to dismiss should be denied.

JANUARY 29, 1981.

/s/ P. Michael Mahoney
United States Magistrate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Name of Presiding Judge:
Honorable STANLEY J. ROSZKOWSKI

Cause No. 80 C 0103 Date March 3, 1981

Title of Cause: ELEANOR SNYDER, etc., vs.
BRUTON SMITH

ORDER

This court, after carefully reviewing the January 29, 1981 report and recommendation of the Magistrate, hereby adopts that recommendation.

Accordingly, it is ordered that defendant's, Bruton Smith, motion to dismiss be and the same is hereby denied.

Roszkowski, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Name of Presiding Judge:
Honorable STANLEY J. ROSZKOWSKI

Cause No. 80 C 0103 Date September 1, 1981

Title of Cause: ELEANOR SNYDER, etc., vs.
BRUTON SMITH

ORDER

Respondent Smith is hereby ordered to arbitrate the matters in dispute in Rockford, Illinois. (DRAFT).

Roszkowski, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In the Matter of the Arbitration between

ELEANOR SNYDER, Executrix of the Estate of Leroy E. Liljedahl,

Petitioner,

No. 80 C 0103 v.

BRUTON SMITH,

Respondent.

ORDER

Before the court is petitioner, Eleanor Snyder's motion to compel the respondent, Bruton Smith, to arbitrate. For the reasons herein stated, that motion is granted.

Petitioner is the Executrix of the estate of Leroy Liljedahl.

The respondent, Smith, is a partner in the partnership, Viking Investment Associates, that was formed between respondent Smith, Leroy Liljedahl, and Robert E. Hitt in September, 1971.

On December 9, 1976, Leroy Liljedahl died. Pursuant to Article V, Section 5.01, of the Partnership Agreement, respondent Smith elected to purchase the deceased's interest or share of the partnership. Thereafter, a dispute arose between petitioner and respondent with respect to the adjusted book value of the decedent's interest.[1]

---

[1] A related case is now pending in the U. S. District Court for the Southern District of Texas in which respondent seeks to have that court establish a fair value for the partnership interest of Leroy Liljedahl. Both parties have agreed to stay that action pending this court's ruling on the present motion.

That dispute forms the underlying basis for the present motion. Petitioner has sought to arbitrate the dispute in Rockford, Illinois. Respondent maintains that the arbitration must proceed in Houston, Texas.

The partnership agreement provides in relevant part that: 1) the Uniform Partnership Act of Texas will govern the rights and obligations of the parties which are not otherwise expressly provided for (Article I, Section 1.01, paragraph b); 2) the partnership shall be limited strictly to the acquisition, development, and management of property, and land acquired by the partnership pursuant to the Area of Interest as defined in Section 8.02 (Article I, Section 1.02, paragraph b); and 3) any controversy or claim arising out of the agreement shall be submitted to arbitration "provided, however, . . . if the matter submitted to arbitration shall involve a dispute as to the adjusted book value of a deceased . . . Partner's Entire Partnership Interest, such arbitration shall be held before three arbitrators, one of whom shall be a certified public accountant and the other two of whom shall be licensed real estate appraisers maintaining offices and doing business in Harris County, Texas. The arbitrators shall be selected by the American Arbitration Association." (Article VII).

Defendant's positions are as follows: first, that petitioner's demand for and initiation of arbitration in Rockford, Illinois was not in accordance with the Partnership Agreement; second, that the American Arbitration Association failed to comply with the Partnership Agreement in its selection of the types of arbitrators to be appointed; and lastly, that, since the Agreement provides that Texas law is to govern and since Texas law provides that arbitration provisions executed in 1971 that do not contain signatures of counsel for the parties are void, the arbitration provisions in the instant case cannot be enforced.

Title 9 U.S.C. § 4 provides for redress to the federal courts. That section states in pertinent part that,

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agree-

> ment for arbitration may petition any United States court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

Section 2, Title 9 U.S.C., limits the application of the Federal Act to maritime transactions and transactions involving interstate commerce. "Commerce", as employed in § 2, is defined in § 1 as meaning "commerce among the several states." Interstate commerce is a necessary basis for application of the United States Arbitration Act, and a contract or agreement not predicated upon interstate commerce must be governed by state arbitration laws. *Shearson Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104, 106 (N.D. Ill. 1980) citing *Pawgan v. Silverstein*, 265 F.Supp. 898, 901 (S.D. N.Y. 1967).

In the instant case, it is clear that this court has diversity jurisdiction over the instant action, which one court has found to be sufficient for deciding questions raised under 9 U.S.C. § 1 et seq. See, *Sears Roebuck and Company v. Glenwall Co.*, 325 F.Supp. 86, 89 (S.D. N.Y. 1970) affirmed 442 F.2d 1350 (2d Cir. 1971).

Second, it is clear that there is no dispute as to the making of the arbitration agreement and the failure to comply therewith.

Consequently, it is within this court's power to order "that hearings and proceedings" to arbitrate under the instant agreement take place in this district and that they proceed in accordance with the arbitration agreement.

And, although the arbitration agreement may not fully comply with all the technical requirements of Texas law regarding the making of arbitration agreements, a matter which we need not decide because, as this court notes, there is a strong congressional and international policy to encourage and favor arbitration. See, e.g. *Weight Watchers of Quebec, Ltd. v. Weight Watchers International*, 398 F.Supp. 1057 (D.C. N.Y. 1975); *Todd Shipyards Corp. v. Marine Vessel Leasing Corp.*, 456 F.Supp. 1378 (D.C. Cal. 1978); *Douglas Aircraft Co. v. N.L.R.B.*, 609 F.2d 352 (9th Cir. 1979).

Accordingly, it is ordered that respondent Smith be and he is hereby ordered to arbitrate the matters in dispute in Rockford, Illinois and that the arbitration proceed in all respects in accordance with the provisions of the Arbitration Agreement requiring, among other things, that three arbitrators be appointed, one of whom shall be a certified public accountant and the other two of whom shall be licensed real estate appraisers maintaining offices and doing business in Harris County, Texas and that the arbitrators shall be selected by the American Arbitrators Association.

ENTER:

/s/ Stanley J. Roszkowski
Judge
United States District Court

Dated 9-1-81

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL
ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

ELEANOR SNYDER, EXECUTRIX OF THE
ESTATE OF LEROY LILJEDAHL, DECEASED
AND

BRUTON SMITH

Case No. 51 180 0440 80 E

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above named Parties, and dated September of 1971 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

I. BRUTON SMITH shall pay to ELEANOR SNYDER, EXECUTRIX OF THE ESTATE OF LEROY LILJEDHAL, DECEASED the sum of FIVE HUNDRED FORTY NINE THOUSAND SEVEN HUNDRED FIFTY FIVE DOLLARS ($549,755.00), by certified check on or before November 10, 1982.

II. A. The administrative fee of the American Arbitration Association shall be borne by BRUTON SMITH and paid as directed by the Association.

B. Compensation of the Arbitrators shall be borne equally by the parties and paid as directed by the Association.

III. This Award is in full settlement of all claims submitted to this Arbitration.

[Signatures of Arbitrators omitted in printing.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Name of Presiding Judge:
Honorable STANLEY J. ROSZKOWSKI

Cause No. 80 C 0103 Date May 4, 1983

Title of Cause: ELEANOR SNYDER, etc.
vs. BRUTON SMITH

ORDER

Petitioner's application for confirmation of an arbitration award is granted. The arbitration award of October 15, 1982 is confirmed. Respondent's motion to vacate or modify the award is denied. (DRAFT)

Roszkowski, J.—

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

ELEANOR SNYDER, EXECUTRIX OF THE ESTATE OF LEROY E. LILJEDAHL,

Petitioner,

No. 80 C 103 vs.

BRUTON SMITH,

Respondent.

ORDER

Before the court is petitioner's application for confirmation of an arbitration award and Respondent's Motion to Vacate or modify the award. For the reasons stated herein, petitioner's application is granted and respondent's motion is denied.

Jurisdiction is invoked pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and diversity of citizenship. The amount in controversy exceeds $10,000.

Petitioner Eleanor Snyder is Executrix of the Estate of Leroy E. Liljedahl, who was a partner of Viking Investment Associates. Respondent Bruton Smith is a surviving partner of the partnership. The partnership agreement provided an option for surviving partners to purchase the partnership interest of a deceased partner. The agreement also provided for arbitration in the event the parties cannot agree on the value of the partnership interest.

On December 9, 1976 Leroy Liljedahl died, and on January 31, 1977 respondent elected to purchase the decedent's entire partnership interest. The Executrix petitioned this court to compel arbitration, alleging that

respondent refused to submit to arbitration. On September 1, 1981 this court ordered the parties "to arbitrate the matters in dispute . . . in accordance with the provisions of the Arbitration Agreement."[1]

On October 15, 1982 an arbitration panel of the American Arbitration Association awarded petitioner the sum of $549,755 in full settlement of all claims submitted to arbitration, to be paid by November 10, 1982. On November 19, 1982 Petitioner applied to this court for confirmation of the arbitration award.

Respondent moved to vacate or modify the award. He argues that the arbitrators exceeded their authority under the partnership agreement by awarding Petitioner $549,755. Respondent contends the award was contrary to the parties' submissions at the arbitration hearing since petitioner set the adjusted book value of decedent's partnership interest at $321,145.

The Federal Arbitration Act provides that district courts may confirm, vacate, or modify an arbitration award. 9 U.S.C. S9-11. The court may vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made." 9 U.S.C. § 10(d). The court may modify an award "where the arbitrators have awarded upon a matter not submitted to them." 9 U.S.C. § 11(b).

Arbitrators are, however, given discretion in making awards, and the scope of judicial inquiry into the propriety of an award is narrow. The Supreme Court in *United*

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[1] This court also previously decided two ancillary issues which the respondent has raised in his memorandum. Respondent urges the arbitration award be set aside on the basis of lack of in personam jurisdiction over the defendant and improper venue. This court decided on March 3, 1981 that respondent had transacted business and had contacts in Illinois sufficient for the court to maintain personam jurisdiction. The court further decided on September 1, 1981 that arbitration was to take place in Illinois.

States Steel v. Enterprise Wheel, 363 U.S. 593, 80 S.Ct. 1358 (1960) set out the role of arbitrators when interpreting parties' agreements. The arbitrator

> is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

363 U.S. at 597, 80 S.Ct. at 1361. The court further stated that interpretation of the parties' agreements is the role of the arbitrator, not the court.

> It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contracts is different from his. 363 U.S. at 599, 80 S.Ct. at 1362.

The proper inquiry for the court is whether the arbitration award draws its essence from the parties' agreements. *United States Steel v. Enterprise Wheel*, 363 U.S. at 597, 80 S. Ct. at 1361.

The Seventh Circuit has considered the *United States Steel* standard. In *Amoco Oil Co. v. Oil, Chemical, and Atomic Workers*, 548 F.2d 1288 (7th Cir., 1977), *cert. denied*, 431 U.S. 905, 97 S.Ct. 1697 (1977), the court held that an arbitration award draws its essence from the parties' agreements "so long as the interpretation can in some rational manner be derived from the agreement 'viewed in the light of its language, its context, and any other indicia of the parties' intention'." 548 F.2d at 1294. And in *National Railroad Passengers Corp. v. Chesapeake and Ohio Railway*, 551 F.2d 136 (7th Cir., 1977) the court held that "arbitrators do not exceed their powers by misconstruing a contract." If "irrationality of an award is a ground for reversing, its application will be reserved for truly extraordinary circumstances." 551 F.2d at 142.

This court's inquiry is whether the award draws its essence from the partnership agreement and whether there was evidence submitted at arbitration to support the award.

The partnership agreement provides that all controversies arising out of the agreement and all disputes pertaining to the purchase of decedent's partnership interest be submitted to arbitration. (Art. VII; Art. V, § 5.01). It also provides for the payment of interest. (Art. V, § 5.01 (f)). It contemplates that arbitrators may depart from the amount designated by the accountant as the adjusted book value of the deceased partner's interest, and increase the purchase price. (Art. V, § 5.01(h)). The agreement allows the seller to accelerate payment if all or part of the principal or interest remains unpaid. (Art. V, § 5.01(f)).

At the hearing the arbitrators heard evidence that Respondent elected to purchase the decedent's entire partnership agreement, and that Respondent breached the partnership agreement in several respects. And on the issue of damages, the arbitrators heard the testimony of Rolland Emerson, a Certified Public Accountant, who testified that the entire amount of damages borne by the estate due to Respondent's breach totalled $535,000. (Arbitration Hearing Transcript, September 28, 1982 at 143). This amount represented the adjusted book value of decedent's partnership interest if paid according to the schedule set out in the agreement, plus interest and income lost due to Respondent's non payment. Petitioner further alleged damages to the estate in appraisal and arbitration costs, taxes, and attorney's fees.

In assessing the propriety of the arbitrator's award, it is clear that the arbitrators possessed the authority to resolve the parties' entire dispute. Article VII of the Agreement provided that "[a]ny controversy or claim arising out of or relating to this agreement, or to the interpretation, breach or enforcement thereof, shall be submitted to three arbitrators." Such broad language has been held to "cover contract-generated or contract-related disputes between the parties however labeled." *Acevedo*

Maldonado v. PPG Industries, Inc., 514 F.2d 614 (1st Cir. 1975). *Cf. Kurt Orban Co. v. Angel Metal Systems*, 573 F.2d 739, 740 (2d Cir. 1978) ("Any doubts about the scope of the submission agreement should be resolved in favor of coverage.") Consequently, the arbitrators were empowered to decide all aspects of the parties' contractual dispute.

Employing the Seventh Circuit test of *Amoco Oil Co. v. Oil, Chemical and Atomic Workers, supra*, the arbitration award is "in some rational manner derived from the agreement." 548 F.2d at 1294. The arbitrators were authorized to consider all the disputes of the parties and to establish a purchase price including but not limited to the accountant's adjusted book value of the decedent's partnership interest. The agreement called for interest and an option of accelerating all payments when a payment is overdue. It is within the arbitrator's discretion to use their judgment in formulating remedies and to view the parties' agreement in light of the circumstances of the case. Therefore it was within the arbitrator's discretion to look beyond the adjusted book value to the totality of damage suffered by petitioner in making its award. The totality of the loss, set by the arbitrators at $549,755, was rationally supported by the record. Mr. Emerson's testimony, alone, established a loss of $535,000, excluding costs, taxes and legal fees. After accounting for these additional factors, it cannot be said that the $549,755 award was irrational. Consequently, the award will not be overturned.

Respondent also argues the arbitration award should be vacated because it is in "manifest disregard" of applicable law. Respondent argues that the partnership agreement is silent on the payment of interest for past due amounts. The agreement provides that when it is silent as to a term, Texas law governs the term. Texas law provides that interest be paid at 6%. Tex.Rev.Civ.Stat.Ann. § 5069-1.03. The argument continues that the arbitrators disregarded Texas law in awarding an amount which exceeds $321,145 plus 6% interest.

The "manifest disregard" of law test has been derived from dicta in *Wilko v. Swain*, 346 U.S. 427, 74 S. Ct. 182 (1953). The Seventh Circuit commented on the standard in *National Railroad Passenger Corp. v. Chesapeake and Ohio Railway*, 551 F.2d 136 (7th Cir. 1977).

> We share the reservations recently expressed by the Second Circuit as to whether the Wilko dictum was actually intended to add "manifest disregard" of the law to the statutory grounds for vacating an award in 9 U.S.C. § 10 . . . How courts are to distinguish in the Supreme Court's phrase between 'erroneous interpretation' of a statute . . . and 'manifest disregard' of it, we do not know; one man's 'interpretation' may be another's 'disregard'. Moreover, since arbitrators have no obligation to state the rationale underlying their award, there may be no basis whatsoever for a court to determine whether they have manifestly disregarded the law or simply misinterpreted it.

551 F.2d at 143 n.9 (Citations omitted).

Notwithstanding the questionable viability of the standard, the arbitrator's award does not evidence a manifest disregard of Texas law. The partnership agreement provides that interest is to be paid at the prevailing prime rate. Art. V, § 5.01(f). The arbitrators were entitled to interpret this provision and rely on the prime rate, as well as all other provisions of the agreement in settling the parties' dispute.

This court therefore finds that the arbitrator's award was proper. The arbitration award of October 15, 1982 is confirmed. Respondent's motion to vacate or modify the award is denied.

ENTER:

/s/ Stanley J. Roszkowski
Judge
United States District Court

Dated May 4, 1983

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Name of Presiding Judge:
Honorable STANLEY J. ROSZKOWSKI

Cause No. 80 C 0103 Date May 20, 1983

Title of Cause: ELEANOR SNYDER, etc.
vs. BRUTON SMITH

JUDGMENT

* * *

Judgment is entered in this cause in favor of the Petitioner, ELEANOR SNYDER, as Executrix of the estate of Leroy E. Liljedahl against Respondent, BRUTON SMITH, directing the Respondent to pay immediately the total sum of $576,041.59 to the Petitioner in exchange for Leroy E. Liljedahl's Entire Partnership Interest. upon payment of $576,041.59 together with costs to be taxed by the clerk and interest from the date of entry of the judgment to the date of payment the Petitioner shall deliver to the Respondent the appropriate duly executed instruments assigning and transferring good and marketable title to Leroy E. Liljedahl's Entire Partnership Interest.

Roszkowski, J.—

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

ELEANOR SNYDER EXECUTRIX of the
Estate of Leroy E. Liljedahl,

Petitioner-Appellee,

No. 80-C-00103 vs.

BRUTON SMITH,

Respondent-Appellant.

NOTICE OF APPEAL
(Docketed June 21, 1983)

Notice is hereby given that Bruton Smith, Respondent above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the Judgment (directing Respondent to pay FIVE HUNDRED SEVENTY-SIX THOUSAND FORTY-ONE AND 59/100THS DOLLARS ($576,041.59) to Petitioner in exchange for Leroy E. Liljedahl's entire partnership interest) entered in this action on the 20th day of May, 1983.

Counsel responsible for briefs and oral argument will be designated at a later date.

/s/ Edward J. Fahy
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Opinion by Judge Flaum
Judge Bauer dissenting in part
JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 7, 1984.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

ELEANOR SNYDER, Executrix of the Estate of Leroy Liljedahl,

Plaintiff-Appellee,

No. 83-2151 vs.
BRUTON SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 80 C 00103—Judge Stanley Roszkowski.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED with directions, with costs, in accordance with the opinion of this Court filed this date.

[736 F.2d 409 (1984)]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ELEANOR SNYDER, EXECUTRIX OF THE ESTATE OF LEROY LILJEDAHL,

Plaintiff-Appellee,

No. 83-2151 *v.*

BRUTON SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 80 C 00103—**Stanley J. Roszkowski,** *Judge.*

ARGUED JANUARY 18, 1984—DECIDED JUNE 7, 1984

Before BAUER and FLAUM, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

FLAUM, *Circuit Judge.* This appeal from the district court's order confirming an arbitration award challenges that order on a number of grounds. The district court had ordered the parties to arbitration in Rockford, Illinois. In that order, the court held that it had personal jurisdiction over appellant Bruton Smith. The court further held that the arbitration clause was contained in a "contract evidencing a transaction involving commerce" and thus the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14 (1982), was applicable to the dispute. Finally, the court held that it could compel arbitration to take place in the

Northern District of Illinois even though the arbitration clause specified that any arbitration was to take place in Houston, Texas. After arbitration, the court confirmed the arbitration award, and Smith appealed. For the reasons stated below, we agree with the district court's holdings regarding personal jurisdiction and the applicability of the FAA, but we reverse the court's holding that it could compel arbitration in the Northern District of Illinois.

I

Appellee Eleanor Snyder is the executrix of the estate of Leroy Liljedahl. Liljedahl and appellant Smith, together with a third individual named Robert Hitt, were partners in Viking Investment Associates (Viking). The Viking partnership is limited to the ownership of certain property located in Harris County, Texas, and to any property purchased by the partnership within one mile of that property.

The partnership agreement was executed in September 1971. At that time, all three partners were Illinois residents.[1] The partnership mailing address was in Rockford, Illinois. For a period of time, Smith conducted the partnership's business from an office in Rockford.[2] The partnership borrowed money from and maintained a checking account with a bank in Rockford.

The partnership agreement provides that the death of a partner does not terminate the partnership but vests the surviving partners with the right to purchase the interest of the deceased partner. The agreement further provides that if the surviving partners or partner exercise the option to purchase, the parties are to attempt to agree on a purchase price; if the parties fail to agree

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[1] Smith is now a resident of North Carolina and was served with process by a federal marshal in North Carolina.

[2] The office, however, was Smith's, not the partnership's. Magistrate's Report and Recommendation at 7.

on a price, the price shall be determined by arbitration. The partnership agreement states in pertinent part:

> Any controversy or claim arising out of or relating to this agreement, or to the interpretation, breach or enforcement thereof, shall be submitted to three arbitrators and settled by arbitration in the City of Houston, Texas, . . . provided, however, . . . if the matter submitted to arbitration shall involve a [dispute] as to the [purchase price] of a deceased, . . . Partner's Entire Partnership Interest, such arbitration shall be held before three arbitrators, one of whom shall be a certified public accountant and the other two of whom shall be licensed real estate appraisers maintaining offices and doing business in Harris County, Texas. . . . Any award made by any majority of the Arbitrators shall be final, binding, and conclusive on all parties hereto for all purposes, and a judgment may be enforced thereon in any court having jurisdiction thereof.

Viking Partnership Agreement, Article VII.

Liljedahl died on December 9, 1976. On January 31, 1977, Smith notified Snyder by letter that he elected to purchase Liljedahl's entire interest.[3] At that time, Smith was a resident of Illinois and the letter bore a return address in Rockford, Illinois. At some time after January 1977, Smith became a resident of North Carolina.

The parties were unable to agree on a purchase price. Smith returned to Illinois several times to negotiate the price. On July 15, 1980, Snyder served Smith with written demand for arbitration. On July 28, Smith notified the American Arbitration Association that he refused to participate in the arbitration. On that date, Smith also filed suit in a Texas state court, requesting the court to establish a purchase price for the partnership interest and

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[3] The other partner, Hitt, elected not to exercise his option to purchase.

alleging a cause of action for breach of contract. Snyder removed the case to federal district court in Texas. On August 4, 1980, Snyder filed a petition to compel arbitration in the district court for the Northern District of Illinois under section 4 of the FAA, 9 U.S.C. § 4 (1982). Smith moved to dismiss the Illinois action for improper service of process and lack of personal jurisdiction. The matter was referred to a magistrate, who recommended that the court deny the motion to dismiss. On March 3, 1981, the court denied the motion. Smith subsequently submitted to the court a memorandum arguing that arbitration under the agreement could not take place in Illinois.

The district court in Texas, pursuant to agreement of the parties, entered an order staying its proceedings pending resolution of the Illinois action. On September 1, 1981, the district court in Illinois ordered the parties to arbitrate in Rockford, Illinois. Smith did not appeal that order.

On October 15, 1982, the arbitration panel awarded Snyder the sum of $549,755.00 plus administrative fees. Snyder applied to the district court in Illinois for an order confirming the arbitration award; Smith moved to vacate or modify the award. The court confirmed the arbitration award and entered judgment against Smith. Smith appealed.

On appeal, Smith raises four issues. First, Smith argues that the district court lacked personal jurisdiction over him. He contends that his casual and sporadic activities in Illinois are insufficient to meet the "transaction of business test" of the Illinois long-arm statute and that the cause of action did not "arise from" any transaction of business of his in Illinois. Second, he argues that the FAA is not applicable because the partnership agreement was not a "contract evidencing a transaction involving commerce" as required by 9 U.S.C. § 2 (1982). Smith maintains that the agreement itself must evidence interstate commerce, that "involving commerce" is a much narrower test than "affecting commerce," and that any

casual and sporadic interstate activities in which the partnership engaged are not sufficient to meet the statutory standard for application of the FAA. Third, Smith argues that the district court lacked the power to compel arbitration in the Northern District of Illinois because the arbitration agreement provided that arbitration was to take place in Houston, Texas; Section 4 of the FAA provides that the court shall order the parties to arbitrate "in accordance with the terms of the agreement." Finally, Smith argues that the order of confirmation and judgment violates article III of the Constitution.

Snyder argues that the district court correctly compelled arbitration and confirmed the award. First, Snyder contends that the district court's exercise of personal jurisdiction over Smith satisfies both the requirements of due process and the standards of the Illinois long-arm statute. She argues that the "arising from" requirement is broadly construed, and as such, this cause of action arises from Smith's transaction of business in Illinois. Second, she argues that the FAA is applicable because the "involving commerce" requirement must be construed broadly and that the facts support a finding that interstate commerce is involved. Third, Snyder asserts that the district court could compel arbitration in the Northern District of Illinois because the only statutory requirement is that the district court have subject matter jurisdiction over the controversy, which it had here. According to Snyder, any valid objection Smith could have would be as to venue, and Smith has waived any venue objection through failure to comply with rule 12(g) & (h) of the Federal Rules of Civil Procedure. Finally, Snyder argues that Smith did not raise his constitutional objections below and that in any event the district court's order did not violate article III.

II

We first must determine whether we have jurisdiction to examine the merits of the issues raised. At oral argument, counsel for Snyder requested this court to dismiss

the appeal on the basis of the decision in *University Life Insurance Co. of America v. Unimarc Ltd.*, 699 F.2d 846 (7th Cir. 1983), which held that an order compelling arbitration is final and appealable under section 1291 even though the district court retains jurisdiction solely for the purposes of resolving further disputes over arbitrability and enforcing any arbitration award. *Id.* at 849. Smith did not appeal from the order compelling arbitration. Snyder argues that the time for appeal from that order has expired, *see* Fed. R. App. P. 4(a), and thus this court lacks jurisdiction to review any issues decided in that order. *See Northcross v. Board of Education*, 611 F.2d 624, 635 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

In this case, the district court compelled arbitration, in a proceeding where the only judicial remedy sought was an order to arbitrate, and it retained jurisdiction to enforce any arbitration award. Thus, it is clear that the order compelling arbitration was final and appealable when entered according to this court's decision in *University Life Insurance*. That case, however, was decided in January 1983; the order to compel arbitration in this case was issued in September 1981. We conclude, for the reasons below, that we will not apply the decision in *University Life Insurance* retroactively.

Whether to apply a decision retroactively depends on a number of factors: the prior history of the rule in question, that is, whether the new rule overrules past precedent or decides an issue of first impression; whether retroactivity will further or retard the rule's operation; and the inequity imposed by retroactive application. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *cf. Salem v. Stumes*, 104 S. Ct. 1338 (1984). Prior to *University Life Insurance*, this court had not squarely held that such an order was final and appealable. Indeed, this court had stressed a strong policy against encouraging such piecemeal appeals. *See, e.g., Whyte v. THinc Consulting Group International*, 659 F.2d 817, 818 n.2 (7th Cir. 1981). When the district court ordered arbitration, in September 1981, responsible counsel would have believed that

the order was interlocutory. The area of appealability of arbitration orders is one of "medieval if not Byzantine pecularities," *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183, 189 (1st Cir. 1972), and a "source of understandable confusion to the bar," *Timberlake v. Oppenheimer & Co.*, 729 F.2d 515, 517 (7th Cir. 1984), where the law is constantly changing.[4] In such an area of law, counsel cannot be expected to anticipate the twists and turns that the law may take. The effect of applying the decision in *University Life Insurance* retroactively here would be to deprive the appellant of any opportunity to present his claims to this court for review. This obviously unfair result leads us to conclude that we will not dismiss the appeal for lack of jurisdiction. *See de Mouy v. Ingvoldstad*, 664 F.2d 21, 23 n.2 (2d Cir. 1981) (Adams, J., concurring) ("[i]n such a situation, it would be inequitable for an appellate court to decline to hear the appeal"). *See also West v. Keve*, 721 F.2d 91 (3d Cir. 1983).

The Supreme Court, in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981), held, "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." In that case, the court of appeals held that an order denying a motion to disqualify counsel was not appealable prior to final judgment but, because its holding was contrary to precedent, it determined the merits of the order. The Supreme Court held that when an appellate court finds an order interlocutory and nonappealable, the court must dismiss the appeal. The Court did not address the issue of whether an appellate court must dismiss the appeal

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[4] *Compare, e.g., Timberlake v. Oppenheimer & Co.*, 729 F.2d 515 (7th Cir. 1984) (order refusing stay of arbitration not appealable under § 1292(a)(1)) *with Whyte v. THinc Consulting Group Intern.*, 659 F.2d 817 (7th Cir. 1981) (order granting stay of arbitration appealable) *with Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981) (denial of stay pending arbitration appealable under § 1292(a)(1)).

where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court. Thus, *Firestone* does not require this court to dismiss this appeal.

III

We turn to the issue of whether the district court had personal jurisdiction over Smith. A federal district court has personal jurisdiction over a party in a diversity suit only if a court of the state in which the district court sits would have such jurisdiction. *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1212 (7th Cir. 1984). In Illinois, a nonresident party can be sued if it performs one of the acts enumerated in the Illinois long-arm statute or if it is doing business in Illinois, as long as the due process "minimum contacts" requirement is met. *Id.*; *see International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There is no claim that Smith is doing business in Illinois, and thus we limit our inquiry to the long-arm statute.

The constitutional due process requirement is satisfied by "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In cases such as this, where the claim is that a controversy "arises from" the defendant's contacts with the forum, the " 'relationship among the defendant, the forum and the litigation' is the essential foundation" of personal jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 52 U.S.L.W. 4491, 4492 (U.S. April 24, 1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).[5] Re-

[5] In *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 52 U.S.L.W. 4491 (U.S. April 24, 1984), the Supreme Court addressed the minimum contacts necessary for personal jurisdiction in suits not "arising out of" or "related to" the defendant's contacts with the forum. The Court did not discuss the minimum contacts necessary where, as here, the suit "arises out of" the defendant's contacts with the forum.

cent cases have emphasized the reasonableness of subjecting a defendant to suit. *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d at 1213; *Honeywell, Inc. v. Metz Apparatewerk*, 509 F.2d 1137 (7th Cir. 1975). Several factors are relevant to an assessment of reasonableness: the defendant's physical presence in the forum state while transacting business, *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d at 1214; and the foreseeability that the defendant would be subject to suit in the forum, *id.* at 1212 n.4; *see World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 297 (1980).

Illinois has imposed additional personal jurisdiction requirements through its long-arm statute. This statute provides that a person submits itself to the jurisdiction of Illinois courts if it "engages in the transaction of any business" within Illinois and if the cause of action "arises from" this transaction.[6] The question of personal jurisdiction under the Illinois statute is separate from the question of the requirements of due process. *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d at 1213; *Cook Associates, Inc. v. Lexington United Corp.*, 87 Ill. 2d 190, 197, 429 N.E.2d 847, 850 (1981) (boundaries of Illinois

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[6] The statute provides in pertinent part:

> Acts submitting to jurisdiction—Process.
>
> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
>
> (1) The transaction of any business within this State;
>
> * * * *
>
> (c) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

Ill. Rev. Stat. ch. 110, § 2-209(a)(1), (c) (1983) (formerly codified at Ill. Rev. Stat. ch. 110, § 17).

statute are not to be equated with the test under the due process clause). Illinois cases establish that, to qualify as a transaction of business that establishes jurisdiction under the long-arm statute, an act by the nonresident defendant must give rise to the plaintiff's cause of action; in other words, the plaintiff's claim must "lie[ ] in the wake of the commercial activities by which [the] defendant submitted to the jurisdiction of Illinois courts." *Loggans v. Jewish Community Center*, 113 Ill. App. 3d 549, 557, 447 N.E.2d 919, 925 (1983); *see also Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d at 1215; *Cook Associates, Inc. v. Lexington United Corp.*, 87 Ill. 2d at 198-99, 429 N.E.2d at 851. The "transaction of business" standard does not require that the nonresident defendant conduct business within Illinois regularly or systematically; a single act may be sufficient, as long as the cause of action arises from that act. *Johnson v. United Presbyterian Church*, 103 Ill. App. 3d 869, 874, 431 N.E.2d 1275, 1279 (1981).

Turning to the facts of this case, we hold that Smith's activities in Illinois are sufficient to qualify as a transaction of business that establishes jurisdiction under the long-arm statute. While he was an Illinois resident, Smith mailed a letter to Snyder, notifying her that he was exercising his option to purchase Liljedahl's share of the partnership. Smith also came to Illinois and negotiated with Snyder over the purchase price for the partnership interest. These activities constitute the transaction of business. Snyder's claim for arbitration over the purchase price arises from the letter and the failed negotiations; the claim "lies in the wake" of Smith's actions while in Illinois. Thus, we hold that the district court had jurisdiction over Smith under the Illinois long-arm statute.

We further hold that the exercise of jurisdiction here comports with the "minimum contacts" requirement of the due process clause. Smith's sending a letter, while a resident of Illinois, to another Illinois resident, exercising an option to purchase, and returning to Illinois to negotiate the price, makes it reasonable for an Illinois court to exercise jurisdiction. By taking these actions in Illinois,

Smith chose to invoke the benefits and protections of Illinois law. His connections with Illinois, particularly transacting business while present within the state, are such that he should have anticipated that he could be sued there. His physical presence in Illinois while taking these actions gives Illinois an interest in adjudicating this dispute. Any inconvenience to Smith in conducting the suit in Illinois, although perhaps not minimal, is not seriously greater than it would be if the suit were conducted in Texas. Thus, the relationship between this defendant, this forum, and this litigation is such that the requirements of the due process clause are met.

IV

We turn next to the question of whether the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), is applicable to this dispute. The FAA makes enforceable only those arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (1982). There is no maritime transaction involved here, and thus we must decide whether the partnership agreement evidences a transaction involving commerce. The requirement that transactions involving interstate commerce be "evidenced by" the contract does not limit a court to considering only those transactions expressly authorized on the face of the contract in determining whether the FAA applies. In *Prima Paint Corp. v. Flood & Coughlin Manufacturing Co.*, 388 U.S. 395, 401 n.6 (1967), the Supreme Court relied on an affidavit submitted to the district court in concluding that interstate commerce was involved. Thus, in this case, we may look to the partnership agreement and affidavits to determine whether there is a transaction involving interstate commerce.

The Supreme Court has stated that "[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927, 941 (1983). For that reason, courts have declared a strong

policy favoring the arbitration of contract disputes. *See, e.g., id.*; *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*, 643 F.2d 863, 867 (1st Cir. 1981). For example, any questions as to whether an issue is arbitrable are to be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. at 941; *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 643 (7th Cir. 1981). Similarly, because of the strong policy favoring arbitration, the requirement of "evidencing a transaction involving commerce" must be construed broadly. *See Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*, 643 F.2d at 867.

A broad interpretation of the "involving commerce" requirement is supported by several decisions. In *Prima Paint Corp. v. Flood & Coughlin Manufacturing Co.*, 388 U.S. 395, 401 n.7 (1967), the Court refused to limit the applicability of the FAA to contracts for the interstate shipment of goods. The Court quoted from the House Report accompanying the FAA: " '[t]he control over interstate commerce [one of the bases for the legislation] reaches not only the actual physical interstate shipment of goods but also contracts *relating* to interstate commerce.' " *Id.* (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) (emphasis supplied)). In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 200-01 (1956), the Court stated that the contract did not involve commerce because there was no showing that the petitioner was working in commerce, producing goods for commerce, or engaging in activity that affected commerce. *See also Grand Bahama Petroleum Co. v. Asiatic Petroleum*, 550 F.2d 1320, 1324 (2d Cir. 1977).

The Supreme Court has recently discussed the purpose of the "involving commerce" requirement in deciding whether the FAA applies in state courts. The Court stated:

> We would expect that if Congress, in enacting the Arbitration Act, was creating what it thought to be

> a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. Yet at the same time, its reach would be limited to transactions involving interstate commerce. We therefore view the "involving commerce" requirement in § 2, not as an inexplicable limitation on the power of federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.

Southland Corp. v. Keating, 104 S. Ct. 852, 860 (1984). Thus, the Court equated the breadth of "involving commerce" with the extent of Congress's power to regulate under the commerce clause. Under the commerce clause, Congress may reach activities "affecting" interstate commerce. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981). That the requirement that an arbitration agreement involve commerce is not a limitation but a qualification suggests that Congress intended the FAA to apply to all contracts that it constitutionally could regulate.

Thus, it is clear that the "involving commerce" language must be construed very broadly. We need not decide today whether Congress intended the FAA to apply to all contracts affecting interstate commerce, for it is clear that the partnership agreement presented in this case falls well within the constitutional limits. The real estate at issue was located in Texas; the partners lived in, and the partnership was managed from, Illinois. The partnership borrowed money from and maintained a checking account with a bank in Illinois. Thus, the partnership agreement involved interstate commerce and the FAA is applicable.

V

We turn finally to the question of whether, under section 4 of the FAA, the district court for the Northern District of Illinois could compel arbitration to take place

in that district when the partnership agreement provides that arbitration is to take place in Houston, Texas. Section 4 provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . [T]he court shall make an order directing the parties to proceed to arbitration in accordance with terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

Under the statute, a district court has no power to order arbitration to take place outside of its own district. *Econo-Car International, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3d Cir. 1974); *see also Couleur International Ltd. v. Saint-Tropez West*, 547 F. Supp. 176 (S.D.N.Y. 1982). Yet under the statute, the court must order the parties to arbitrate "in accordance with the terms of the agreement"; one term of the agreement is the parties' forum selection clause.[7]

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[7] Several other circuits have considered this dilemma, although none has considered it in the procedural posture that is presented here. In *Continental Grain Co. v. Dant & Russell*, 118 F.2d 967 (9th Cir. 1941), the court held that a district court in Oregon could compel arbitration in its district despite the fact that the arbitration agreement provided that arbitration was to take place in New York. However, in that case, the party challenging the district court's order had itself brought the action to compel arbitration in Oregon. In *Hilti, Inc. v. Oldach*, 392 F.2d 368 (1st Cir. 1968), the court held that the district court in Puerto Rico could stay its proceedings pending arbitration in Connecticut that was pur-

(Footnote continued on following page)

We first must determine whether Smith's failure specifically to raise the forum selection clause as improper venue in his rule 12(b) motion to dismiss means that he waived the defense. Rule 12(g) provides that if a party makes a motion under rule 12(b) and fails to raise improper venue, he waives the defense. Some courts have considered forum selection clauses to be a type of venue provision. *See, e.g., Bense v. Interstate Battery System*, 683 F.2d 718, 720-22 (2d Cir. 1982); *In re Fireman's Fund Insurance Co.*, 588 F.2d 93 (5th Cir. 1979); *Aacon Auto Transport v. State Farm Mutual Automobile Insurance Co.*, 537 F.2d 648 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757 (3d Cir. 1973). We need not decide whether a forum selection clause constitutes "venue" within the meaning of rule 12, for we find that Smith sufficiently raised his defense based on the clause in his rule 12 motion. In that motion, Smith labelled his grounds to dismiss as lack of proper service of process and lack of personal jurisdiction. In his discussion of personal jurisdiction, Smith clearly laid out his argument that any arbitration could only take place in Texas because of the forum selection clause. This was sufficient to alert the district court that Smith was arguing that a district court in the Northern District of Illinois could not enter an order to compel arbitration.

---

[7] *continued*
suant to the parties' agreement. However, that case involved a motion to stay arbitration and not a petition to compel arbitration. In *Econo-Car International, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3rd Cir. 1974), the court held that the district court in the Virgin Islands could not compel arbitration in New York City even though the parties' agreement provided for arbitration in New York City. The court did not decide whether the district court could order arbitration in the Virgin Islands. In *DuPuy-Busching General Agency v. Ambassador Insurance Co.*, 524 F.2d 1275 (5th Cir. 1975), the court held that where the party seeking to avoid arbitration brought suit in a forum other than the one provided for in the contract, the other party had to file its motion to compel in that forum and that district court could compel arbitration.

The fact that Smith did not label his defense as one of venue does not matter. The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril. *Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978); *Monte Vista Lodge v. Guardian Life Insurance Co. of America*, 384 F.2d 126 (9th Cir. 1967), *cert. denied*, 390 U.S. 950 (1965). Thus, Smith did not waive any objections on grounds of improper venue.

The purpose of the FAA is to make arbitration agreements valid and enforceable. *Southland Corp. v. Keating*, 104 S. Ct. at 858-60. The right and duty to arbitrate disputes is purely a matter of contractual agreement between the parties. This court has emphasized the "voluntary nature" of commercial arbitration. *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 678 (7th Cir.), *cert. denied*, 104 S. Ct. 529 (1983). An arbitration agreement, including its forum selection clause, is a freely-negotiated contract between the parties.

Courts must give effect to such freely-negotiated forum selection clauses. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-19 (1972). "The choice of [ ] forum was made in an arms-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12. *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (holding enforceable forum selection clauses in arbitration agreements); *Sam Reisfeldt & Son Import Co. v. S. A. Iteco*, 530 F.2d 679, 680-81 (5th Cir. 1976).

Snyder has not argued that there is any "compelling or countervailing" reason that the forum selection clause here should not be enforced, other than that she filed suit in the Northern District of Illinois and that court could compel arbitration only in its own district. We do not find this reason to be sufficient to override the parties' freely-negotiated agreement. Moreover, if Snyder were to prevail here, any party to an arbitration agreement could

avoid the effect of the agreed-to forum merely by filing suit in a different district. This in turn could lead to the parties racing to different courthouses to obtain what each thinks is the most convenient forum for it, in disregard of its contractual obligations. This disregard is not what Congress intended when it enacted a statute to make arbitration agreements enforceable. Thus, the district court in this case had no power under the statute to order arbitration in its district in contravention of the parties' agreement. *See Netherlands Curacao Co. v. Kenton Corp.*, 366 F. Supp. 744, 745-46 (S.D.N.Y 1973) (party cannot move district court to compel arbitration where place for arbitration not within district); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (S.D.N.Y. 1971) (proper district for filing motion to compel is district where contract provides proceedings are to take place).

The district court in this case, under the FAA, could not order arbitration in the Northern District of Illinois. The district court, under the FAA, also could not order arbitration in Houston, Texas. In a case such as this, where the petition to compel arbitration was the only relief sought, the district court should dismiss the petition or, upon motion, stay its proceedings.[8]

VI

Because the district court improperly compelled arbitration in the Northern District of Illinois, we reverse its order compelling arbitration and the further order confirming the award with directions to the district court to vacate its orders and judgment and dismiss the case.

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[8] We do not reach the question of whether a district court may order arbitration in its own district in contravention of the forum selection clause when the parties waive the benefit of the clause.

BAUER, *Circuit Judge*, dissenting in part. Although I agree with most of the majority's well-written opinion, I am convinced that the district court properly compelled arbitration in the Northern District of Illinois. Section 4 extends the power to compel arbitration to "*any* United States district court which, save for such agreement, would have jurisdiction under Title 28." 9 U.S.C. § 4 (1982) (emphasis added). The phrase "save for such agreement" apparently means "in the absence of the arbitration agreement." *See Couleur International Ltd. v. Saint-Tropez West*, 547 F. Supp. 176, 177 (S.D.N.Y. 1982); *Warren Brothers Co. v. Community Building Corp. of Atlanta, Inc.*, 386 F. Supp. 656, 665 (M.D.N.C. 1974). Here, the diversity of citizenship between the parties and the amount in controversy would vest the district court with subject matter jurisdiction in the absence of the parties' agreement to arbitrate. Because the district court also had personal jurisdiction over the defendant, Section 4 seems to give the court the power to compel arbitration here. The majority, however, finds a conflict between Section 4's requirement that the district court compel arbitration only in its own district, and the Section's mandate that the parties arbitrate according to "the terms of the agreement." Because the agreement here specified that the arbitration must occur in Houston, Texas, the majority holds that the district court could compel arbitration neither in its own district nor in any other district.

The provisions of Section 4 are inconsistent only if the parties' forum selection clause is a "term of the agreement." Under the majority's interpretation, the broad power conferred on the district courts in Section 4 is completely negated whenever an arbitration agreement includes such a forum selection clause. The frustrating results of this interpretation are apparent in the instant case, where the majority concludes that the district court is powerless to compel arbitration, even though the court meets the Section 4 jurisdictional requirement. Courts generally give effect to forum selection clauses, but such provisions need not be honored in the face of "some com-

pelling and countervailing reason." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). The interest in honoring the choice of forum here is outweighed by the need to give full effect both to the jurisdiction conferred under Section 4 and to the policy favoring arbitration that underlies the Federal Arbitration Act. Although I appreciate the majority's concern that this interpretation might lead to forum shopping, it is important to remember that a district court may act under Section 4 only if it would have jurisdiction in the absence of the arbitration agreement and venue would be proper. Accordingly, I would affirm the district court's order in its entirety.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 3, 1984.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

ELEANOR SNYDER, EXECUTRIX of the
ESTATE of LEROY LILJEDAHL,

Plaintiff-Appellee,

No. 83-2151 vs.

BRUTON SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Western Division.
No. 80 C 00103—Stanley Roszkowski, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Plaintiff-Appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel having voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRUTON SMITH,

Plaintiff,

No. H-80-2018 vs.

ELEANOR SNYDER, Executrix of the Estate of Leroy Liljedahl,

Defendant.

ORDER

On the 19th day of June, 1981, came on to be heard Agreed Motion for Temporary Stay of Proceedings, and the Court having considered the same is of the opinion that it is good and should be granted, therefore, it is,

ORDERED, ADJUDGED AND DECREED that this cause of action and all proceedings herein are STAYED pending final action by the Federal District Court for the Northern District of Illinois, Western Division on the Defendant Eleanor Snyder's Petition to Compel Arbitration.

SIGNED and ENTERED this 19th day of June, 1981.

/s/ Ross N. Sterling
Judge Presiding

(letterhead of)
VINSON & ELKINS
Attorneys at Law
First City National Bank Building
Houston, Texas 77002

July 28, 1980

Mr. James P. Hill
Tribunal Administrator
American Arbitration Association
Chicago Regional Office
230 W. Monroe Street
Chicago, Illinois 60606

RE: Demand for Arbitration of Mrs. Eleanor Snyder, Executrix of the Estate of Leroy Liljedahl

Dear Mr. Hill:

This letter is to notify you that Mr. Bruton Smith, upon whom a demand for arbitration has been served by the attorney representing Mrs. Eleanor Snyder, Executrix of the Estate of Leroy Liljedahl, declines to arbitrate the dispute made the subject of that demand for arbitration for the following reasons:

1. The demand for arbitration is not in accordance with the Viking Investment Associates partnership agreement;

2. Arbitration was not initiated by Mrs. Snyder in accordance with the Viking Investment Associates partnership agreement;

3. The American Arbitration Association has not complied with the provisions of the Viking Investment Associates partnership agreement concerning the types of arbitrators to be appointed;

4. The Viking Investment Associates partnership agreement provides that it is governed by the laws of the State of Texas. Under Texas law, arbitration provisions such as those contained in the Viking Investment Associates partnership agreement are void, because the arbitration agreement does not contain the signature of counsel for the parties.

Consistent with his position, as stated above, Mr. Bruton Smith objects to all of the potential arbitrators whose names are contained on the list that you recently forwarded to him.

Upon receipt of this formal notice of refusal to participate in the commercial arbitration initiated by Mrs. Snyder, please cease all further proceedings in this matter until further direction of the appropriate judicial tribunal.

Please acknowledge receipt of this letter by placing your file mark in the lower portion of the enclosed carbon copy of this letter and returning it to me in the enclosed, self-addressed, stamped envelope.

Thank you for your cooperation.

Very truly yours,

VINSON & ELKINS

By: /s/ John L. Carter
Attorneys for Mr. Bruton Smith

cc: Mr. John D. Whitcher
Attorney at Law
800 North Church
Rockford, Illinois 61103

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

BRUTON SMITH,

Plaintiff,

No. 80-34288 vs.

ELEANOR SNYDER, Executrix of the Estate of Leroy Liljedahl,

Defendant.

PLAINTIFF'S ORIGINAL PETITION

To The Honorable Judge Of This Court:

COMES NOW, Bruton Smith, plaintiff, complaining of Mrs. Eleanor Snyder, Executrix of the Estate of Leroy Liljedahl, defendant, and as his cause of action would show as follows:

I.

Bruton Smith is a resident of the State of North Carolina and is doing business in Houston, Harris County, Texas.

II.

Mrs. Eleanor Snyder, Executrix of the Estate of Leroy Liljedahl, resides at 1909 Boscobel Court, Rockford, Illinois. Mrs. Eleanor Snyder, Executrix of the Estate of Leroy Liljedahl, does not maintain a regular place of business within this state and has no designated agent for service of process within the State of Texas. Eleanor

Snyder, Executrix of the Estate of Leroy Liljedahl, is a party to a contract to be performed in whole or in part in the State of Texas and claims to be the owner of a twenty-five percent (25%) partnership interest in Viking Investment Associates, a partnership which is doing business and owns real estate within the State of Texas, as more fully set forth below. Accordingly, Mrs. Eleanor Snyder, Executrix of the Estate of Leroy Liljedahl, is doing business within the State of Texas and may be served with process, pursuant to Art. 2031b, Tex. Rev. Civ. Stat. Ann., by service of duplicate original citations upon the Secretary of State of Texas.

BACKGROUND

III.

Bruton Smith and Leroy Liljedahl were partners in Viking Investment Associates. A copy of the Viking Investment Associates partnership agreement is attached as Exhibit "A" and here incorporated by reference. Pursuant to that partnership agreement provision was made for the purchase by a surviving partner of a deceased partner's interest in the partnership for its fair market value.

IV.

Leroy Liljedahl died on December 9, 1976.

V.

Pursuant to the Viking Investment Associates partnership agreement, Bruton Smith gave timely notice of his intention to purchase the interest of Leroy Liljedahl. Article V(c) of the partnership agreement provides that the purchase price shall be book value thereof, as of the close of business on the date of such decedent's death, adjusted, however, by substituting in place of book value, the fair market value as of such date of any real estate owned by the partnership.

VI.

The fair market value of the real estate owned by the partnership, on December 9, 1976, was less than One Million Five Hundred Thousand Dollars ($1,500,000.00).

VII.

Based upon the fair market value of the real estate owned by the partnership as of December 9, 1976, Bruton Smith offered to pay more than the fair market value for the interest of Leroy Liljedahl in Viking Investment Associates partnership.

VIII.

Mrs. Eleanor Snyder, as the Executrix of the Estate of Leroy Liljedahl, has refused to convey the partnership interest of Leroy Liljedahl to Bruton Smith in exchange for its fair market value.

IX.

Further, the certified public accountants employed by the partnership failed to procure an independent analysis of the fair market value of the property as of December 9, 1976. Finally, Mrs. Eleanor Snyder, the Executrix of the Estate of Leroy Liljedahl, has attempted to institute arbitration proceedings in violation of the partnership agreement. (Such arbitration provision, even if it were properly followed, is void and unenforceable in this State.)

X.

Due to the failure of Mrs. Eleanor Snyder, as Executrix of the Estate of Leroy Liljedahl, to convey the interest of Leroy Liljedahl in Viking Investment Associates partnership to Bruton Smith on time as agreed, Bruton Smith has incurred damages in the form of increased expenses in an amount of approximately One Hundred Thousand Dollars ($100,000.00).

XI.

Pursuant to the partnership agreement, the parties have, in Article 8.06 agreed that the "respective rights and obligations of the partners under the partnership agreement shall be enforceable by specific performance, injunction, or other equitable remedy, but nothing herein contained is intended to, nor shall it, limit or affect any rights or rights at law or statute or otherwise if any party aggrieved as against the other for a breach or threatened breach of any provision hereof. . . ."

CAUSE OF ACTION

XII.

Mrs. Eleanor Snyder, the Executrix of the Estate of Leroy Liljedahl, has breached her obligations under the Viking Investment Associates partnership agreement. Specifically, she has refused to convey to Bruton Smith the interest of the Estate of Leroy Liljedahl in that partnership in accordance with the provisions of Article 5.

RELIEF

XIII.

Bruton Smith seeks an order of specific performance from this Court decreeing that Eleanor Snyder, as Executrix of the Estate of Leroy Liljedahl, shall convey to him all right, title, and interest in and to the Viking Investment Associates partnership owned by the Estate of Leroy Liljedahl in exchange for its fair market value.

XIV.

Bruton Smith seeks to recover the damage done to him as a result of the failure of Mrs. Eleanor Snyder to perform the obligations of the Estate of Leroy Liljedahl in accordance with the terms of the Viking Investment Associates partnership.

XV.

Pursuant to Article 2226, Tex. Rev. Civ. Stat. Ann., Bruton Smith seeks to recover his reasonable attorney's fees incurred in the prosecution of this action for breach of contract which he alleges to be in the amount of Twenty-Five Thousand Dollars ($25,000.00).

WHEREFORE, PREMISES CONSIDERED, Bruton Smith respectfully prays that Eleanor Snyder, the Executrix of the Estate of Leroy Liljedahl, be served with process in this cause and directed to appear and answer herein, and, after trial, that he be awarded a judgment of specific performance of the provisions of the Viking Investment Associates partnership requiring Eleanor Snyder to convey the interest of Leroy Liljedahl to him in exchange for its fair market value, that he recover the damage done to him in the amount of One Hundred Thousand Dollars ($100,000.00), that he recover his attorney's fees incurred in connection with the prosecution of this action, and that he have such other and further relief, both at law and in equity, to which he may show himself to be entitled.

Respectfully submitted,

VINSON & ELKINS

By /s/ John L. Carter
2100 First City National Bank Bldg.
Houston, Texas 77002
State Bar No. 03920700
(713) 651-2124

ATTORNEYS FOR PLAINTIFF
BRUTON SMITH

STATUTES AND RULES INVOLVED

Federal Arbitration Act

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed.

If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Federal Rules of Appellate Procedure

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

Office Supreme Court, U.S.
FILED
OCT 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ELEANOR SNYDER, EXECUTRIX OF THE ESTATE OF LEROY LILJEDAHL,

Petitioner,

v.

BRUTON SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

GASTON H. GAGE*
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BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT:

I. There is no Division Among The Circuits.....6

II. The Timely Notice of Appeal From the Docketing of the Money Judgment Gave the Court of Appeals Jurisdiction. 17

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Behimer v. Sullivan, 261 F.2d 467 (7th Cir. 1958), aff'd, 363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) 26

Blaski v. Hoffman, 260 F.2d 317 (7th Cir. 1958), aff'd, 363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) 25, 26

Catlin v. United States, 324 U.S. 229, 65 S. Ct. 631 (1945) 24

Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967 (9th Cir. 1941) 8, 10, 12

Couleur International Ltd. v. Saint Tropez West, 547 F. Supp. 176 (S.D. N.Y. 1982) 14, 15, 16

Duphy Bushing General Agency v. Ambassador Ins. Co., 524 F.2d 1275 (5th Cir. 1975) 10, 11

Econo-Car International, Inc. v. Antilles Car Rentals, Inc., 499 F.2d 1391 (3d Cir. 1974) 12, 13, 14

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 6, 20, 21, 22

New Orleans v. New Orleans Waterworks Co., 142 U.S. 79 (1891).....7

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 20

Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 7 (1951) 18

Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (9th Cir. 1979) 7

STATUTES

U.S. CONST., art. III, § 1 .....2, 25

28 U.S.C. § 1291 .....18, 21, 23

Federal Arbitration Act, § 4.....6, 7, 8, 11, 17

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 1, of the United States Constitution states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

STATEMENT OF THE CASE

After Smith notified Snyder by letter dated January 31, 1977 of his election to purchase Liljedahl's partnership interest, Smith negotiated for the purchase, several times returning to Illinois for that purpose. Contrary to Snyder's implication that Smith was obstreperous, Smith's efforts were consistent with the provision of the Partnership Agreement directing the parties to attempt to agree upon a price for the deceased partner's interest. The Partnership Agreement further provided that upon failure to agree on the value of the partnership interest, the value

would be settled by arbitration in the City of Houston, Texas, where the partnership transacted its only business. The purchase negotiations were unsuccessful (App. 33)[1]. The Partnership Agreement stipulated that it was to be governed by Texas law.

Snyder's first and only demand for arbitration was dated July 14, 1980 and was a demand for arbitration in Rockford, Illinois in contravention of the arbitration clause in the Partnership Agreement (App. 1, 2). Smith's counsel, Vinson & Elkins of Houston, Texas, rejected the demand for arbitration, stating that "[t]he demand for arbitration is not in accordance with the Viking Investment Associates partnership agreement." (App. 52.)

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[1]App. refers to Snyder's Appendix.

On July 28, 1980, Smith filed suit in a Texas State Court requesting the court to establish the price for Liljedahl's partnership interest and alleging a cause of action for breach of the Partnership Agreement (App. 33, 34). Snyder removed the case to the United States District Court in Houston on the ground of diversity.

In lieu of filing a counterclaim for arbitration of the issues in Smith's Texas action, Snyder filed a petition to compel arbitration of those issues in the United States District Court for the Northern District of Illinois. Smith opposed the petition to compel arbitration upon the grounds that the district court in Illinois lacked personal jurisdiction of him, lacked subject matter

jurisdiction, and could not compel arbitration in contravention of the arbitration clause (App. 31, 32).

Smith moved to vacate or modify the arbitrators' award (App. 23, 34) upon the grounds that the court lacked both subject matter and in personam jurisdiction required to confirm or enter judgment upon the award and that the arbitrators had exceeded their powers. The district court denied Smith's motion.

Upon the call of this case in the Court of Appeals, Snyder for the first time moved ore tenus for dismissal upon the grounds that Smith's Notice of Appeal[2] from the judgment in favor of Snyder[3] gave the Court of Appeals no jurisdiction of Smith's appeal. Snyder's petition

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[2]Filed June 17, 1983 (App. i).

[3]Docketed May 20, 1983 (App. i).

states essentially the same grounds, i.e., "the Seventh Circuit lacked subject matter jurisdiction over Smith's untimely appeal and, therefore, should have dismissed the appeal without reaching the merits." (Pet. 16.)

The Court of Appeals held:

> Thus, the district court in this case had no power under the statute to order arbitration in its district in contravention of the parties' agreement.

(App. 47.)

The Court of Appeals appropriately distinguished the jurisdictional decision of this Court relied upon here by Snyder, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) (App. 37, 38).

ARGUMENT

I.

There Is No Division Among The Circuits.

The circuit courts of appeals are not divided in their decisions under Section

Four of the Federal Arbitration Act on the issue of the enforcement of situs clauses in arbitration agreements. The decisions of the other circuit courts, on the contrary, illustrate the respect accorded freely-negotiated situs provisions. These decisions recognize that an arbitration agreement is simply a contract to be enforced in accordance with the agreements between the parties. Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (5th Cir. 1979). Courts have been uniformly unwilling to rewrite the contract between the parties. New Orleans v. New Orleans Waterworks Co., 142 U.S. 79 (1891). The opinion of the Seventh Circuit in the instant case is consistent with this well-settled practice of enforcing the agreement between the parties as negotiated and written.

Snyder erroneously contends that the Ninth Circuit adopted a construction of Section Four of the Federal Arbitration Act [hereinafter "Section Four"] which directly conflicts with the majority opinion in the Seventh Circuit. A careful reading of the decision in Continental Grain Co. v. Dant & Russell Inc., 118 F.2d 967 (9th Cir. 1941), the case relied on by Snyder, indicates that the situation before the court in that case was inapposite to the one at hand. In Continental Grain, the Ninth Circuit Court of Appeals affirmed an Oregon District Court's order compelling arbitration in Oregon, despite an express clause in the arbitration agreement providing for arbitration in New York. The appellant in that case, however, was the party who had originally invoked the jurisdiction of the Oregon court by applying to it for an

order compelling arbitration. The Ninth Circuit did not hold, as Snyder contends, that the statutory provision requiring that a court only compel arbitration within its district took precedence over the clause selecting New York as the situs for arbitration. Rather, the court based its holding on the appellant's waiver of his right to contest an order compelling arbitration when the appellant himself had instituted the proceedings in Oregon. Therefore, Snyder's claim that a different result would have been reached in the case at hand had the case been brought in the Ninth Circuit is lacking in substance.

Moreover, there is no basis for Snyder's contention that a similarly situated litigant in the Fifth Circuit Court of Appeals would obtain a different result in that circuit than in either the

Seventh or Ninth Circuits; the Fifth Circuit has simply not addressed the issue of the enforceability of a situs for arbitration provision in the procedural context presented by either the instant case or by the Continental Grain case in the Ninth Circuit. In the unusual case of Duphy Bushing General Agency v. Ambassador Insurance Company, 524 F.2d 1275 (5th Cir. 1975), the Fifth Circuit Court of Appeals deemed the parties choice of the location for arbitration to be so important that it affirmed a district court's order compelling arbitration outside of its district. In that case, the United States District Court of the Southern District of Mississippi compelled arbitration in New Jersey where the motion to compel arbitration was a compulsory counterclaim to a suit brought in Mississippi for injunctive relief against

arbitration. The motion to compel would have been barred by res judicata had it not been raised in Mississippi. The Fifth Circuit emphasized the parties' "Section 4 right to have the arbitration agreement performed in accordance with the terms of the agreement." Id. at 1278. The Court explained its holding, stating that it would not "create a procedural trap by which a party to an arbitration agreement might be deprived of its contractural right to arbitration at the location specified in the agreement." Id. at 1277-78. If Snyder in the instant case had prevailed, the Seventh Circuit decision would have conflicted with the position of the Fifth Circuit in allowing a party to negate a situs for arbitration provision by winning the race to the courthouse in a foreign district. It is instructive to note that the Fifth

Circuit specifically found that its enforcement of the situs term was not inconsistent with the result reached by the Ninth Circuit in Continental Grain. Id. at 1277.

Snyder also relies on the decision of the Third Circuit Court of Appeals in Econo-Car International, Inc. v. Antilles Car Rentals, Inc., 499 F.2d 1391 (3rd Cir. 1974) in her attempt to create confusion among the circuits. The Third Circuit's holding in Econo-Car is consistent with, rather than contrary to, the Seventh Circuit's opinion in the case at hand. In Econo-Car, the court held that a district court did not have the power to either compel arbitration outside of the district in which the petition was filed or to compel arbitration within its district in disregard of the terms of the arbitration agreement. In

that case, the District Court of the Virgin Islands had compelled arbitration in New York in accordance with the terms of the arbitration agreement. The Court of Appeals reversed the district court and dismissed the case. The appellate court refused to remand the case to the district court with instructions that the court order arbitration within the Virgin Islands. The district court simply had no power to compel arbitration whatsoever when arbitration was to occur in a foreign jurisdiction pursuant to the arbitration agreement. The court stated that:

> [A] party who seeks arbitration in a district court properly having venue may well be unable to secure an arbitration order in such district court in circumstances like those presented by this case.

499 F.2d at 1394.

The Seventh Circuit in the instant case, like the Third Circuit in Econo-Car, held that the district court was without power to order arbitration in its district in disregard of the terms of the arbitration agreement and moreover, that the district court could not order arbitration outside of its district. The Seventh Circuit stated that:

> The district court in this case, under the FAA, could not order arbitration in the Northern District of Illinois. The district court, under the FAA, also could not order arbitration in Houston, Texas. In a case such as this, where the petition to compel arbitration was the only relief sought, the district court should dismiss the petition or, upon motion, stay its proceedings.

(App. 47.)

Snyder also cites the United States District Court for the Southern District of New York's most recent interpretation of Section Four, Couleur International Ltd. vs. Saint Tropez West, 547 F. Supp.

176 (S.D.N.Y. 1982) for the proposition that a district court may not compel arbitration outside of its own district. Smith has never contested that the power of a court to compel arbitration is limited by the statutory provision in Section Four that a court may only compel arbitration within its district. However, Smith has argued, and the Seventh Circuit has so held, that a court may not compel arbitration in disregard of the terms of the arbitration agreement. The result is that if the arbitration agreement specifies situs, the only and proper district in which to file a motion to compel is the one which has jurisdiction over the selected location for arbitration. The decision in Couleur is consistent with the decision of the Seventh Circuit. In Couleur the arbitration agreement sought to be enforced by the defendant in a New

York Court called for arbitration in California. The United States District Court for the Southern District of New York held that it lacked the power to compel arbitration in California, stating that:

> This motion simply was made in the wrong district. What defendant should have done was to seek to have this action stayed pursuant to Section 3. (Citations omitted.) The proper place to obtain the relief defendant seeks on this motion is California.

Id. at 178.

The decision of the Seventh Circuit, rather than creating "uncertainty" by its interpretation of the Federal Arbitration Act recognizes that arbitration will be utilized as a viable alternative to litigation only when the agreement between the parties is respected. If the holding in the Seventh Circuit had been different, the resultant uncertainty as to which

terms of an arbitration agreement are enforceable surely would have served as a disincentive to the use of arbitration in the future. More importantly, the Section Four requirement that arbitration be compelled in accordance with the terms of the agreement would have been violated. The decision of the Seventh Circuit reconciled the Section Four requirement that a court can only compel arbitration within its district with the requirement that arbitration must be compelled in accordance with the terms of the agreement.

II.

The Timely Notice Of Appeal From The Docketing Of The Money Judgment Gave The Court Of Appeals Jurisdiction.

Snyder's contention that the Court of Appeals had acquired no jurisdiction by Smith's timely notice of appeal from final judgment lacks merit.

The jurisdiction of the Court of Appeals was provided by 28 U.S.C. § 1291. That statute gave the Court of Appeals "jurisdiction of appeals from all final decisions of the district courts ...." [Emphasis added.]

The award of the arbitrators was for $549,755. The judgment docketed by the district court on May 20, 1983 was for the sum of $576,041.59. The docketing of this judgment was a final appealable decision within the purview of 28 U.S.C. § 1291. Mr. Justice Jackson and Mr. Justice Frankfurter stated the generally accepted view that "[w]hile a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." [Emphasis added.] Stack v. Boyle, 342 U.S. 1, 12, 72 S. Ct. 1, 7 (1951) (separate opinion).

Smith moved to vacate or modify the arbitrator's award upon grounds that the district court lacked both in personam and subject matter jurisdiction and that the arbitrators had exceeded their powers. On appeal, Smith challenged the order of confirmation, judgment, and order compelling arbitration upon those grounds. Smith also challenged the constitutional jurisdiction of the district court to confirm the award and enter judgment against him upon the grounds that the arbitrators derived their authority, not from an arbitration agreement of the parties, but pursuant to the district court's interpretation that the Federal Arbitration Act overrode and supplanted crucial provisions of the arbitration clause; therefore, that the award of the arbitrators and judgment were the result of an

unconstitutional and ineffective delegation of the Article III, judicial power of the United States to an arbitration tribunal. See, Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Snyder contends the Court of Appeals lacked jurisdiction to review these questions.

The Court of Appeals' construction of the Act, however, is a constitutional one in contrast with the district court's construction which might well have resulted in the Act's violation of Article III as so construed.

Snyder's asserted basis for review by this Court is a supposed conflict of the Court of Appeals' decision in this case with this Court's decision in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981). Snyder's belief in this basis for review is misplaced. Firestone

was an appeal from an interlocutory order. Smith appealed from final judgment and posted bond to stay the execution threatened by Snyder.

The Court of Appeals considered and distinguished Firestone upon the grounds that this Court in Firestone "did not address the issue of whether an appellate court must dismiss the appeal where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court." (App. 37, 38.) Moreover, Snyder's petition by omitting part of the essential holding misstates the rule of Firestone. The Eighth Circuit had before it in Firestone an appeal from an interlocutory order which was not appealable. This Court held:

> We hold that a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior

> to final judgment in the underlying litigation ... A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.

Id. at 379.

In contrast, the Seventh Circuit in this case had before it a timely appeal from a final judgment and thus had jurisdiction to consider the record brought up by that appeal.

The distinction between the two cases is that the Eighth Circuit in Firestone lacked "discretion to consider the merits of a case over which it is without jurisdiction....," id. at 379, while the Seventh Circuit had jurisdiction to consider plain error in the record brought up by timely appeal from final judgment. For this reason there is no conflict in the two decisions.

Snyder has not been prejudiced in a legal sense, as she contends, by the decision of the Seventh Circuit. Snyder's delays and expense were self-inflicted and result solely from her wilful refusal to follow the clear directions of the arbitration clause in the Partnership Agreement.

Snyder cites no authority for the contention that failure to appeal the order compelling arbitration forever deprived the Court of Appeals of jurisdiction to consider plain error occurring either before or after the docketing of the order.

Snyder cites six Court of Appeals decisions at page 17 of the petition as the weight of authority that "an order compelling arbitration ... was a final appealable order under 28 U.S.C. § 1291." Those six cases all appear to be distinguishable

from the case sub judice upon the grounds that the final action in each appeared to be the order compelling arbitration, no jurisdiction being retained as in the case sub judice for any other purpose, and no other legal or factual issue being subsequently resolved by those district courts. This Court ruled in Catlin v. United States, 324 U.S. 229, 236, 65 S. Ct. 631, 635 (1945) (in affirmance of the Seventh Circuit), "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." Moreover, the Advisory Committee's Notes under Rule 12(h)(3) of the Federal Rules of Civil Procedure state that "lack of jurisdiction over the subject matter [is] expressly preserved against waiver." No court of appeals has ruled in a case like this one that error like the error corrected by the Seventh

Circuit is waived and not reviewable by failure to appeal from an order compelling arbitration.

For the above reasons, the jurisdictional decision of the Seventh Circuit in this case is consistent with decisions of this Court and courts of appeals for other circuits. The district court's lack of statutory power under the Arbitration Act and constitutional lack of power under Article III, Section 1, to read the controlling clause out of the Arbitration Act, compel arbitration, confirm an award, and enter judgment thereon, are all questions presented to the Court of Appeals by Smith's timely notice of appeal from the final money judgment and within its jurisdiction. See Blaski v. Hoffman, 260 F.2d 317, 321 (7th Cir. 1958), aff'd, 363 U.S. 335, 80 S. Ct.

1084, 4 L. Ed. 2d 1254 (1960); Behimer v. Sullivan, 261 F.2d 467 (7th Cir. 1958), aff'd, 363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960).

CONCLUSION

For the above reasons, Snyder's petition should be denied.

Respectfully submitted,

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